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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,
Petitioners,

vs.

ROBERT W. KELLEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an appellate court's failure to award costs pursuant to Rule 39, Federal Rules of Appellate Procedure, precludes an award of attorneys' fees under the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, which provides for fee awards "as part of the costs."

2. Whether a 1972 order of the Court of Appeals approving a desegregation plan as in conformity with existing Supreme Court mandates and resolving all issues then before the Court is not a final order precluding the reopening of the litigation prior to 1972 for an award of attorneys' fees pursuant to 42 U.S.C. §1988, merely because the District Court retained jurisdiction in the case and supplemental activity relating to implementation of the desegregation plan occurred.

3. Whether, in considering plaintiffs' application for attorneys' fees pursuant to 42 U.S.C. §1988, the Court of Appeals may properly reverse the District Court's factual findings concerning the proceedings at the trial level or the appropriate hourly rates to be awarded, without finding those decisions clearly erroneous.

4. Whether the District Court *must* award a plaintiff's counsel his requested hourly rate or personal billing rate when the proof establishes a lower rate prevailing in the relevant legal community.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Metropolitan County Board of Education of Nashville and Davidson County, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 23, 1985.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Sixth Circuit entered on September 23, 1985 (reprinted in the Appendix at A. 1) is reported at ____ F.2d ____ (6th Cir. 1985). The panel's opinion on the same appeal which was subsequently vacated by a majority of the Court's judges upon the peti-

tioners' application for rehearing *en banc* is reprinted at A. 29. These opinions review the District Court's opinion, *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, (reprinted at A. 43), which is reported at 558 F.Supp. 468 (M.D. Tenn. 1983).

In addition, for the Court's convenience the most recent substantive opinions relating to the attorneys' fees issue before the Court are contained in the Supplemental Appendix, referred to herein as S.A..

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 23, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, §1988 as amended. Proceedings in vindication of civil rights; attorney's fees. (Reproduced in pertinent part.)

> In any action or proceeding to enforce a provision of §1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

United States Code, Title 28, Rule 39, Federal Rules of Appellate Procedure. Costs. (Reproduced in pertinent part.)

> (a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if

a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

STATEMENT OF THE CASE

This case concerns the application of the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, to a thirty year old desegregation case in Nashville, Tennessee, and the relative roles of the District Courts and Courts of Appeal in considering awards under that statute.

In 1983, the District Court for the Middle District of Tennessee acted on the plaintiffs' motion for attorneys' fees filed in 1975, finding that fees should not be awarded for work performed prior to a 1971 final remedial order, that fees could not be awarded for the numerous appeals in which the plaintiffs had never been awarded costs, and that the time for which compensation was requested by the plaintiffs should be reduced 10 % for duplication and for reconstruction of time records. The District Court then awarded fees for substantially all hours claimed since 1972 at the 1983 prevailing community rates ($100.00 for experienced counsel and $60.00 for associate counsel), and added to this a 25% multiplier. 558 F.Supp. 468 (M.D. Tenn. 1983) (A. 43-68). On appeal, a panel initially reversed and remanded the case (A. 29), and on application of the Board of Education, a majority of the active judges voted to rehear the case *en banc*. Following the rehearing, a divided Court of Appeals rejected almost totally the District Court's opinion. In so doing, the Sixth Circuit rejected the clear relationship between costs and attorneys' fees under 42 U.S.C. §1988 recognized by this Court in *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), required the reopening of the 1971 order for an award of fees, and reversed the District Court's decisions concerning finality and appropriate rates without holding them clearly erroneous. The Court of Appeals then

remanded the case to the District Court for further hearings as to pre-1972 and appellate fees, along with the direction to determine, pursuant to *Hensley v. Eckerhart,* 461 U.S. 424 (1983), when the plaintiffs had prevailed during this thirty year old lawsuit. (A. 1-28).

A. The Historical Underpinnings of the Fee Award

1. The 1971 desegregation plan deemed final by the District Court.

This desegregation case began in 1955 immediately following *Brown v. Board of Education,* 347 U.S. 483 (1954). Since 1955, many remedial orders have been entered adopting desegregation plans which mirrored the development of desegregation law from *Brown v. Board of Education, supra,* to *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), to *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). With each passing era of desegregation law, new remedies were adopted for Nashville's public schools.[1]

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[1] For example, in 1958 the District Court approved a remedy providing for gradual desegregation (not integration) of the Nashville city schools. This was the famous "grade a year" plan, upon which many other localities modeled their plans. At that time, this plan was sufficient to comply with Supreme Court mandates, and the District Court later adopted a parallel plan for Davidson County. *E.g. Kelley v. Board of Education of Nashville City Schools,* 8 R.R.L.R. 651 (M.D. Tenn. 1958), *aff'd,* 270 F.2d 209 (6th Cir. 1959), *cert. denied,* 361 U.S. 924 (1959); *Maxwell v. Board of Education of Davidson County,* 203 F.Supp. 768 (M.D. Tenn. 1960), *aff'd,* 301 F.2d 828 (6th Cir. 1962), *rev'd in part and remanded sub nom, Goss v. Board of Education of Knoxville,* 373 U.S. 683 (1963). These plans remained in effect long after the consolidation of the county and city cases by consent decree on September 10, 1963. Indeed, there were no efforts to change the plan until the decisions of the Supreme Court in *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), and *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969).

In 1971, the District Court, pursuant to the plaintiffs' motions for immediate relief based upon *Green, supra,* ordered the implementation of a comprehensive desegregation plan drafted by a team from HEW, mandating busing for racial balance purposes in every area of this 500 square mile county where it was practical to do so, pursuant to the model in *Swann, supra.* (S.A. 169). This plan was appealed by both the plaintiffs and defendants, each urging their own plan for the school system. 463 F.2d 732 (6th Cir. 1972) (S.A. 179). On May 17, 1972, both appeals were rejected by the Sixth Circuit, which found the HEW plan in compliance with Supreme Court mandates. The Court of Appeals thus affirmed the HEW plan, rejected the plaintiffs' application for attorneys' fees and double costs under the law prevailing at that time, and ordered the parties to pay their own costs. 463 F.2d 734, 743-47, 752 (S.A. 185-86, 205-12, 224). While approving the plan as one designed to establish a unitary school system, the Court of Appeals recognized that should adverse effects or changed circumstances occur after implementation, these problems could be addressed by the District Court under the general notion that all decrees in equity are susceptible to modification based upon changes in the law or facts. *Id.* at 745-46 (S.A. 209). On November 6, 1972, the Board of Education's petition for certiorari was denied by this Court. 409 U.S. 1001 (1972) (S.A. 225).

2. **Substantive proceedings after 1971.**

After the implementation of the 1971 desegregation plan in the fall of 1971, all efforts of the District Court were directed toward assuring the plan's adequate implementation and/or adjusting it in light of changed circumstances.[2] 558 F.Supp. 468,

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[2] Prior to 1979, only two short hearings were held, one involving the recalcitrance of the city council (which was added as a party) in funding the purchase of sufficient buses, and the other involving a group of intervening parties who sought busing costs from the Department of Health, Education, and Welfare. *See* 492 F.Supp. 167, 172-75 (M.D. Tenn. 1979) (S.A. 72-74).

473-74 (A. 50-53). On April 11, 1975, the plaintiffs first filed their motion for attorneys' fees. (A. 106). In 1979, the first new round of hearings directed toward changing the plan which had been in effect for more than eight years began, the plaintiffs asserting that demonstrable adverse effects associated with busing young black children mandated changes, and the defendants asserting that population growth and shifts mandated changes in school utilization and building.

After months of proof beginning in 1979, the District Court in 1980 determined that changed circumstances and resegregation, resulting from the 1971 remedy itself, not from the actions of the school board, mandated consideration of a new and different remedy. 479 F.Supp. 120, 122-23 (M.D. Tenn. 1979) (S.A. 43-45); 492 F.Supp. 167 (M.D. Tenn. 1980) (S.A. 62). On April 17, 1981, this plan was approved by the District Court. 511 F.Supp. 1363 (M.D. Tenn. 1981) (S.A. 128). On August 19, 1981, just two days before school was to open under the new desegregation plan, the Court of Appeals ordered the District Court's new plan stayed, stating in part that "*a final desegregation order*" (the 1971 plan) should not be modified without prior appellate review. (S.A. 155-56). Upon the school board's application for extraordinary writ to this Court, Justice Stevens declined to disturb the Court of Appeals' stay, sharing the view that changes in the final 1971 plan should be reviewed by the Court of Appeals before they were implemented. (S.A. 157-58). On July 27, 1982, the Sixth Circuit rejected the District Court's new plan, finding that it "do[es] not withstand constitutional scrutiny."[3]

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[3] The Sixth Circuit's *en banc* opinion argues that the plan to which it was referring in this statement was the 1971 plan. (A. 6). It is clear from the Sixth Circuit's 1982 opinion that the plan which was being considered was the District Court's new plan, calling in part for elementary schools of a neighborhood character. 687 F.2d 814, 824 (6th Cir. 1982) (S.A. 6). Certiorari was denied by this Court on January 24, 1983. 459 U.S. 1183 (1983).

B. The District Court's Fee Award

In 1982, the District Court held a hearing on the plaintiffs' request for over $1.4 million in attorneys' fees, representing plaintiffs' claim for legal work reconstructed by counsel[4] from 1955 to the date of the hearing. Relying on *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 635 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), and *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir. 1978), the District Court initially held that the fee application for work performed prior to the District Court's approval of a comprehensive desegregation plan in 1971, affirmed by the Sixth Circuit in 1972, was barred, because the 1971 order was a final one representing a discrete step in the litigation which settled all issues to that point, including costs and attorneys' fees. The District Court found that any litigation after affirmance of the 1971 order was directed not toward attacking the order itself but toward implementing it and modifying it as changed circumstances or adverse effects could be demonstrated. 558 F.Supp. 468, 473-74 (M.D. Tenn. 1983) (A. 50-54).

The District Court then applied the rule set forth in *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982), holding that since costs had never been awarded to the plaintiffs on any appeal during the long history of the litigation, pursuant to Rule 39(a), Federal Rules of Appellate Procedure, they could not at this late date recover attorneys' fees for those appeals under the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, which awards such fees as "costs." 558 F.Supp. 468, 476 (A. 55-56).

After excluding pre-1972 and appellate fees, the District Court found, based upon the testimony of a myriad of local attorneys, that $100.00 per hour for senior attorney Williams and $60.00 per hour for associate attorney Dinkins constituted the

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[4] Counsel's claim for the entire thirty year period was based on reconstructed time.

prevailing rate in 1983 in the city of Nashville. 558 F.Supp. 468, 478 (A. 60-62). The District Court applied these 1983 prevailing rates ($100.00 and $60.00) to all hours claimed by the plaintiffs for District Court work since 1971, with the minor exception of 10% for duplication and reconstructed time, and a small amount of time spent with an expert witness whose testimony the plaintiffs had later repudiated. To this sum, the District Court added a 25% multiplier, thereby effectively increasing Mr. Williams' rate to $125.00 per hour, and Mr. Dinkins' rate to $75.00 per hour. 558 F.Supp. 468, 478-79 (A. 60-62).

Both the plaintiffs and defendants appealed. The plaintiffs asserted that the 1971 order was not a final one under *Northcross, supra,* and that the hourly fee calculated for each lawyer should be raised. The defendants asserted that they should not be responsible for fees resulting from the actions of intervening parties, and that, in any event, *Hensley v. Eckerhart,* 461 U.S. 424 (1983), required the District Court to determine specific stages in this lengthy litigation where the plaintiffs had prevailed.

C. The En Banc Opinion of the Court of Appeals

After a three-judge panel reversed and remanded the District Court's order on February 12, 1985 (A. 29), a majority of the active judges[5] of the Court voted, upon the school board's application, to rehear the case *en banc.* After the hearing, a divided Court entered an opinion which (1) reversed its earlier decision in *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982), holding that costs under 42 U.S.C. §1988 are separate and distinct from appellate costs under Rule 39(a), Federal Rules of Appellate Procedure (A. 6-9); (2) held that the 1971 order was not a final order constituting a discrete step in the Nashville school litigation (A. 3-6); and (3) mandated that the District Court *must* award Mr. Williams his regular hourly rate of $120.00 per hour and Mr. Dinkins $65.00 per hour, in addition to the 25%

[5] Two judges recused themselves from consideration of this case: Judge Gilbert Merritt and Judge Nathaniel Jones.

multiplier awarded by the District Court. (A. 10-12).[6] The Court then remanded the case to the District Court to consider pre-1972 fees and appellate fees, and to determine the specific extent to which the plaintiffs had prevailed under *Hensley v. Eckerhart,* 461 U.S. 424 (1983) (A. 14-16).

A vocal minority, consisting of Judges Kennedy, Engle, and Wellford, dissented in part in two separate opinions. (A. 17, 23). In her opinion, Judge Kennedy, joined by Judges Engle and Wellford, pointed to two problem areas in the majority's opinion. First, the Court's illogical and ill-conceived efforts to distinguish costs under Rule 39(a), Federal Rules of Appellate Procedure, from attorneys' fees awarded as costs under 42 U.S.C. §1988 violated all principles of statutory construction, created a direct conflict with the Eleventh Amendment pursuant to *Atascadero State Hospital v. Scanlon,* ____ U.S. ____, 105 S.Ct. 3142, 3148 (1985), rejected this Court's reasoning in *Marek v. Chesney,* ____ U.S. ____, 87 L.Ed.2d 1 (1985) and, in essence, treated attorneys' fees litigation as an illegitimate child, related neither to costs or judgments, a view most circuit courts had not taken. Second, Judge Kennedy wrote that the $100.00 per hour rate upon which the District Court based its award to Mr. Williams was supported by the record as the generally prevailing rate at the time of the 1983 hearings and was thus clearly within the Court's discretion to award, especially for earlier years when much lower rates, including those of Mr. Williams, had prevailed. (A. 17-23).

In a separate and vigorous dissent, Judge Wellford joined in Judge Kennedy's criticism of the majority's rejection of *Buian,* and argued pointedly that the majority had abrogated its duty to examine the record and the District Court's fact-finding before reversing the hourly fee and finality decrees. According to Judge Wellford, rates in Tennessee during the 1970's had been much lower than $100.00 and $60.00 per hour, as evidenc-

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[6] The Court also largely rejected the school board's contention that it should not be billed for work performed relating to the intervening parties. (A. 12-13).

ed by the many circuit court opinions involving some of the same attorneys. Judge Wellford, therefore, would not have disturbed the rates set by the District Court, finding them well within the discretion of the trial judge who was intimately familiar with the local practice and fees charged, and who had heard testimony from many local attorneys during a three-day hearing. (A. 23-28).

Judge Wellford also dissented vigorously from the majority's finding that the 1971 order was not a final one, disposing of all pending issues resurrected with the change in the law brought about by *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). His dissent recognized that all school desegregation cases are continuing in the sense that jurisdiction is always retained to monitor and modify final injunctive orders if necessary, in light of changed circumstances or changes in the law. Thus, Judge Wellford reasoned that the District Court was well within its discretion when it found as a matter of fact, that the 1971 comprehensive desegregation plan was a final discrete step which should not be reopened for an award of fees for legal work performed prior to the order under the 1976 Civil Rights Attorneys Fees Awards Act. (A. 28).

D. **Denial of the Petition to Rehear**

Because the *en banc* opinion was glaringly inconsistent with the Sixth Circuit's own order in 1981 holding that the 1971 desegregation plan was a final order (S.A. 155), the Board of Education petitioned again for a rehearing, which application was summarily rejected. (A. 69-76).[7] A stay of the Court of Appeals' mandate was granted pending the application to this Court. (A. 77).

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[7] The petition for a second rehearing was filed in order to give the Sixth Circuit an opportunity to resolve this conflict. *See Sun Oil Co. v. Burford*, 130 F.2d 10, 13 (5th Cir. 1942) (discussing power of federal circuit court to consider a second petition for rehearing and to recall its mandate to correct inconsistencies).

REASONS FOR GRANTING THE WRIT

I.

In Rejecting The Plain Meaning Construction Reconciling Costs Under Rule 39(a), Federal Rules Of Appellate Procedure, With Attorneys' Fees Awarded As Costs Under 42 U.S.C. §1988, The Sixth Circuit Has Placed Itself In Conflict With Other Circuits, With The Necessary Implications Of This Court's Decision In *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), And With The Eleventh Amendment.

The majority's outright rejection of its previous rule articulated in *Buian v. Baughard*, 687 F.2d 859 (6th Cir. 1982),[8] reconciling costs under Appellate Rule 39 with the award of attorneys' fees as part of the costs by the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, has created untoward confusion in this circuit and underscored a conflict across the country regarding the nature of attorneys' fees litigation. This position leaves the Sixth Circuit in conflict with opinions from the Fourth, Fifth and Seventh Circuits, *e.g. Gary v. Spires*, 634 F.2d 772, 773 (4th Cir. 1980); *Knighton v. Watkins*, 616 F.2d 795, 797-98 (5th Cir. 1980); *Van Ooteghen v. Gray*, 628 F.2d 488, 497 (5th Cir. 1980), *cert. dismissed*, 451 U.S. 935 (1981); *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980), and with the reasoning of this Court in *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985). Judge Kennedy's dissent

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[8] The Sixth Circuit subsequently recognized on several occasions that fees pursuant to 42 U.S.C. §1988 could not be awarded for appellate work where costs had not been awarded pursuant to Rule 39(a), Federal Rules of Civil Procedure. *Cf. Shimman v. International Union of Operating Engines, Local 18*, 719 F.2d 879 (6th Cir. 1983) (not related to fees under 42 U.S.C. §1988 but recognizing rule). It should be noted that in *Shimman*, Judge Merritt, who had recused himself from the *Kelley* litigation, specifically stated that appellate fees are to be considered as part of the costs under Rule 39(a). *See also Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984), where the mandate was recalled by the Sixth Circuit in order to award costs and fees.

reaches the heart of the conflict when she writes that apparently the majority, without even overruling inconsistent authority in the Sixth Circuit (A. 22),[9] has tacitly adopted the Ninth Circuit's treatment of applications for fees pursuant to 42 U.S.C. §1988 as illegitimate children, falling nowhere within the procedural framework of other civil lawsuits. *Obin v. District No. 9 Int'l Ass'n of Machinists and Aerospace Workers,* 651 F.2d 574 (9th Cir. 1981); *Metcalf v. Borba,* 681 F.2d 1183 (9th Cir. 1982).

This Court in *Marek* recognized the problems in ignoring the clear cost language of Rule 68, Federal Rules of Civil Procedure, and §1988. Without procedural rules neutral in nature governing all types of civil cases, including presumably applications for attorneys' fees falling within them, the administration of justice can never be predictable or efficient. Thus, even apart from the substantive Eleventh Amendment problems raised by the majority's decision to treat civil rights fees as something other than costs without a clear indication that Congress intended to abrogate the Eleventh Amendment,[10] the majority's decision, if allowed to stand, has created a muddle for District Courts considering applications for appellate fees, particularly in protracted cases.

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[9] *See Johnson v. Snyder,* 639 F.2d 316, 317 (6th Cir. 1981) (attorneys' fees awarded under §1988 are awarded as costs and are not controlled by the time limitations of Rule 59(e)); *Fulps v. City of Springfield,* 715 F.2d 1088 (6th Cir. 1983) (costs in Rule 68 do include attorneys' fees when an applicable statute such as §1988 allows attorneys' fees to be taxed as costs to the prevailing party). The *Fulps* reasoning was adopted by this Court in *Marek.*

[10] This problem, articulated by Judge Kennedy in reliance on *Hutto v. Finney,* 437 U.S. 678, 695-98 (1978), and *Atascadero State Hospital v. Scanlon,* ____ U.S. ____, 105 S.Ct. 3142, 3148 (1985) is clear, and is not addressed further herein. *See* Judge Kennedy's discussion at A. 18-19.

The problem for District Courts can be no clearer than in the instant case. During thirty years of litigation and a myriad of appeals, the Sixth Circuit has never once, except in the most recent *en banc* hearing, awarded costs to either party.[11] As Judge Kennedy writes, cost awards are generally matters considered at each level of the federal judicial system for obvious reasons—each level is far more intimately familiar with its own proceedings and the degree to which either party has prevailed. (A. 17-18). With the majority's opinion, not only will the District Courts in the future receive no guidance as to when the plaintiffs may be entitled to fees for appellate work; in this case, and presumably in other protracted cases such as school desegregation cases, the District Court may be required to pass on appellate fee requests based totally on reconstructed time records for thirty years of appeals.[12] This of course will occur without the benefit of the appellate record, briefs, and arguments, and often without the availability of some of the major participants.[13] Under *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this task is well-nigh impossible; under principles of

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[11] There have been many appellate decisions in this case. *E.g. Kelley v. Board of Education of the City of Nashville*, 270 F.2d 209 (6th Cir. 1959), *cert. denied* (upon application of the plaintiffs) 361 U.S. 924 (1959); *Maxwell v. Board of Education of Davidson County*, 301 F.2d 828 (6th Cir. 1962), *rev'd sub nom, Goss v. Board of Education of the City of Knoxville*, 373 U.S. 683 (1963); *Kelley v. Metropolitan County Board of Education, et al.*, 463 F.2d 732 (6th Cir. 1972); *Kelley v. Metropolitan County Board of Education, et al.*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 459 U.S. 1183 (1983).

[12] This will occur, of course, if the final order rule enunciated by the District Court, discussed *infra*, is not addressed by this Court.

[13] It should be noted that the plaintiffs here seek fees for services performed prior to 1972 for Mr. Z. Alexander Looby, who died in 1972. 558 F.Supp. at 476 (A. 57).

common sense and orderly procedure this task is clearly avoidable, given the intimate knowledge of each level of the federal judiciary regarding their own proceedings.

For the bad results that the majority's opinion portends, one need only examine closely the litigation in *Willie M. by Singer v. Hunt*, 564 F.Supp. 363 (W.D.N.C. 1983), *aff'd as modified*, 732 F.2d 383 (4th Cir. 1984), relied upon by the majority opinion. (A. 8). In *Willie M.*, the District Court noted the conflict in the circuits and specifically rejected the *Buian* rationale, indicating that cost awards under Rule 39(a) and 42 U.S.C. §1988 are totally distinct. As Judge Kennedy wrote, the plaintiffs prevailed overall in a class action, but the defendants prevailed on one issue which was the subject of an appeal. The Fourth Circuit awarded no costs on the appeal, but nevertheless the District Court allowed the plaintiffs to recover attorneys' fees, including time spent on the lost appeal. In line with their decision regarding costs previously, the Fourth Circuit on the new appeal reversed the part of the decision that allowed attorneys' fees, presumably for the same reason that costs had not been awarded. In so doing, the Fourth Circuit did not address the link between costs and fees or the *Buian* rule.[14] However, had costs and fees gone hand in hand, as Judge Kennedy suggests, there would have been no need for this further protracted litigation regarding fees.

There is simply no need to engage in such double processes, given the clear language of Rule 39(a) and the clear Congressional intent behind 42 U.S.C. §1988. As recognized in *Marek*, when Congress passed 42 U.S.C. §1988, it was well aware of the Federal Rules of Civil Procedure, and presumably also the Federal Rules of Appellate Procedure. The Civil Rights At-

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[14] Contrary to the District Court's opinion in *Willie M.*, the Fourth Circuit had previously recognized the link. *See Gary v. Spires*, 634 F.2d 772 (4th Cir. 1980).

torneys Fees Awards Act was passed in 1976; Rule 39(a) came into existence in 1968 along with the body of uniform appellate rules. Thus, when Congress enacted 42 U.S.C. §1988 and ordered attorneys' fees as part of the costs, and further specifically indicated that attorneys' fees were to be treated "like other items of costs,"[15] Congress clearly understood the inevitable limits to the already existing procedural rules.[16]

Thus, the better rule is the simplest one — the one embodying the plain and simple meaning of the term costs in the rule and statute in issue. This Court applied that rule in *Marek*;[17] the Sixth Circuit previously applied it in *Buian v. Baughard*, and

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[15] Senate Report 94-1011 at 5913 reads in part as follows:

> [D]efendants in these cases are often state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, *like other items of costs*, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party). (Emphasis supplied.) (Footnotes omitted.)

[16] Of course, in interpreting legislative history, there is a presumption that Congress was aware of the judicial construction of existing law and that new legislation therefore was to be construed within the entire framework of federal statutes. *See Shapiro v. United States*, 335 U.S. 1 (1948); *United States v. Professional Air Traffic Controllers*, 653 F.2d 1134, 1138 (7th Cir. 1981). Further, statutes are to be construed so that they harmonize with one another and are applied in a consistent fashion. *Kokoszka v. Bedford*, 417 U.S. 642 (1974); *Bonner v. Coughlin*, 647 F.2d 931 (7th Cir. 1981).

[17] The majority's efforts to distinguish *Marek* in footnote 9 (A. 7-8), with reference to this Court's discussion of *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) in n. 2 to the *Marek* opinion must fail. Rule 39 does not carry with it its own definition of costs and neither does 42 U.S.C. §1988. Indeed, the Advisory Committee notes to Rule 39 not only refer to 42 U.S.C. §1920 where some costs are defined, but also to other statutes defining or precluding cost awards. Thus, Rule 39 contemplates a search of federal substantive statutes for its application, just as does Rule 68, Federal Rules of Civil Procedure.

continues to do so apparently in other contexts. (*See* n. 9, *supra*). This case presents a particularly appropriate mechanism to resolve the conflicts among the circuits, the inconsistencies within the Sixth Circuit, and the conflict with the Eleventh Amendment.

II.

The Majority's Holding That The District Court's 1971 *Swann* Remedy, Affirmed By The Sixth Circuit In 1972, Was Not A Final Order Disposing Of All Issues Between The Parties Is Inconsistent With The Decisions Of Several Circuit Courts.

In *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 635 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), the Sixth Circuit previously recognized a rule of finality in protracted civil rights cases which it and other circuit courts of appeal have gleaned from *Bradley v. City of Richmond,* 416 U.S. 696 (1974).[18] While this Court's holding in *Bradley* was expressly limited to the retroactive application of the attorneys' fees provision contained in 20 U.S.C. §1617[19] when the propriety of a fee award was pending resolution on appeal at the time the statute was enacted, 416 U.S. at 710, other courts, including the Sixth Circuit, have promulgated a rule precluding the reopening of final orders in protracted cases for

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[18] *See Wheeler v. Durham City Board of Education,* 585 F.2d 618, 623 (4th Cir. 1978); *Henry v. Clarksdale Municipal Special School District,* 579 F.2d 916, 918-19 (5th Cir. 1978); *New York Ass'n for Retarded Children v. Carey,* 711 F.2d 1136, 1145 (2nd Cir. 1983); *Peacock v. Drew Municipal Separate School District,* 433 F.Supp. 1072, 1075-76 (M.D. Miss. 1977).

[19] This statute was initially used by the plaintiffs as a basis for their fee application in this case. The statute has since been repealed, and the award herein was made pursuant to 42 U.S.C. §1988. (*See* 20 U.S.C. §§3205, 3863.)

the award of attorneys' fees under the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988. In the majority opinion, the Sixth Circuit again recognized the finality principle, but refused to consider the District Court's 1971 plan, affirmed by the Court of Appeals in 1972, as such a final order disposing of all claims. (A. 3-6). In so doing, the Sixth Circuit has applied a test of finality which is subjective in nature and is inconsistent with other desegregation orders deemed to be final.

The District Court's 1971 order of a comprehensive desegregation plan ushered in by this Court's decision in *Green v. Board of Education of New Kent County,* 391 U.S. 430 (1968) (S.A. 59); *Kelley v. Metropolitan County Board of Education,* 317 F.Supp. 980 (M.D. Tenn. 1970), fully settled the issues before the Court. The 1971 plan was implemented without a stay from the District Court (S.A. 169, 178), and was in effect in Nashville even before the Court of Appeals affirmed the plan on May 30, 1972, and denied a stay of its mandate pending a petition for certiorari by the school board. (S.A. 212, 225).

In 1983, the District Court, relying on *Northcross, supra,* held that this comprehensive desegregation plan was a final one which could not be reopened for an award of fees requested by the plaintiffs on April 10, 1975.[20] At the time of the plaintiffs' motion, the desegregation plan had been in effect for almost five full school years. The only litigation had concerned matters related to implementation, particularly the need for and source of additional buses. The only filings had concerned plaintiffs' efforts to demonstrate certain adverse effects from the plan, and the defendants' efforts to take care of and house the burgeoning and ever-changing population in Nashville and

[20] While the District Court and the Court of Appeals noted that plaintiffs had filed their petition for fees on February 8, 1974, the record reveals that the petition referred to was filed by a group of third party plaintiffs. Instead, the plaintiffs filed their petition for fees on April 10, 1975. (A. 100, 106).

Davidson County.[21] Thus, the District Court, pursuant to *Northcross,* deemed the 1971 order a final one, upon which a collateral attack in the form of a delayed fee application should not be made. 558 F.Supp. at 472-475 (A. 48-54).

The majority only attacks the District Court's decree as to finality under the 1976 Civil Rights Attorneys Fees Awards Act because litigation resulted after 1971, and because, in its opinion, neither the parties nor the Court of Appeals deemed the order an end to the litigation. Aside from the gross usurpation of the District Court's particular fact-finding function in fee cases and the inconsistencies apparent in the Court of Appeals' characterization of the substantive as opposed to the fees issues in this case, discussed *infra* in III, these factors have simply not been deemed the critical test of finality by other circuits.

As an example, in *Henry v. Clarksdale Municipal Separate School District,* 579 F.2d 916 (5th Cir. 1978), neither pending litigation to require bus transportation nor the pending of an attorneys' fees motion was deemed sufficient to disturb the finality of a comprehensive remedial order. Similarly, in *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir. 1978), the court's retention of jurisdiction in order to supervise the city's desegregation plan was not sufficient to disturb the finality of a previous remedial order, even when accompanied by a motion for further relief following *Swann.* Curiously, the Sixth Circuit in *Northcross* alluded to the possibility that a 1966 order might meet the requirements for finality, a finding later made by the District Court (A. 84-85),[22] but the Sixth Circuit

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[21] A close examination of the Court of Appeals' description of the action in this case after 1971, reveals that the proceedings were supplemental in nature and were not designed to attack the 1971 order itself. (A. 5, n. 3.)

[22] The 1966 order to which this Court was referring merely approved tentatively the implementation of a desegregation plan for the coming school year, and ordered the plaintiffs to file objections within three weeks. *Northcross v. Board of Education of Memphis City Schools,* Civil Action No. 3931, July 29, 1966. (A. 78).

simultaneously recognized that no one understood this order to be the end of the litigation in Memphis.[23]

By reversing the District Court, the Sixth Circuit has left the door open in these protracted civil rights cases. As this Court is aware, many district courts across the country have retained jurisdiction of civil rights cases subject to "final" remedial injunctions, all of which may be modified as appropriate showings of adverse effects, changed circumstances, or contempt are made.[24] Without those showings or a change in the applicable law, presumably these final remedial orders may not be disturbed. Similarly, in the absence of changed circumstances (resegregation) or adverse effects shown to be caused by the 1971 plan, that plan would presumably be in effect today.

Does the Sixth Circuit's opinion mean that the door is always open for applications relating to fees long since incurred and mandates long since issued? The Court of Appeals has answered a hazy yes, calling into question the finality of other remedial orders entered prior to 1971 in this thirty year old

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[23] In *Northcross*, the Sixth Circuit stated as follows: "A limited plan was adopted in 1963, and a year later, this Court again reversed, rejecting the plan as inadequate. Nearly two years later, in 1966, a modified plan was tentatively approved by the District Court, and an uneasy state of repose was reached. While the plaintiffs objected to some aspects of the plan, their motion for an injunction was denied. At the same time, however, the board was put on notice by the court that some aspects of the plan needed further study and additional relief might be ordered in the future." 611 F.2d at 628-629.

[24] This litigation does not impair or refute any order's finality — if it did no order in equity would ever be final. All orders in equity are susceptible to later enforcement actions or actions based upon changes in the law or facts. *E.g. United States v. Swift Co.*, 286 U.S. 106, 119 (1932); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

desegregation case,[25] and presumably in other long-running civil rights actions across the country.

The position taken by the Sixth Circuit in this case does nothing to enhance the ultimate goal of 42 U.S.C. §1988 — the attraction of competent counsel to civil rights litigation.[26] Cases such as *Northcross* and *Kelley* were begun long before fee awards were generally available, and critical stages of these cases were decided long before any lawyers could be lured by the prospect of fees pursuant to the 1976 civil rights statute. Conversely, if the parties' subjective intent or continued litigation of any nature after a final decision in a desegregation case such as *Northcross* and *Kelley* reopens the entire case for an award of fees, the prospects for abuse will be great, and it will be impossible to find a reliable factual basis for a fee award for services performed ten or twenty years earlier. *See Gautreaux v. Chicago Housing Authority,* 690 F.2d 601, 608 (7th Cir. 1982); *Henry v. Clarksdale Municipal Separate School District,* 579 F.2d 916, 919 (5th Cir. 1978).[27]

To petitioners' knowledge, this Court has not directly passed on this finality issue. Consideration by this Court, particularly in light of the remand whereby the District Court will be required to review other final remedial orders in this case, appears appropriate.

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[25] *See* n. 1, *supra.*

[26] Senate Report 94-1011, reprinted in 1976 U.S. Code Congressional Administrative News, p. 5908.

[27] In this instance it should be noted here that all fees requested by the plaintiffs in *Kelley* were based upon reconstructed time, including those hours plaintiffs claim their counsel expended in the 1950's and 60's. Further, Mr. Z. Alexander Looby, one of the counsel for whom plaintiffs seek fees, died several years ago. 558 F.Supp. at 476 (A. 57).

III.

The Court Of Appeals Has Totally Usurped The District Court's Fact-Finding Function In Attorneys' Fees Cases.

As Judge Wellford wrote in dissent, in two separate instances the Court of Appeals flagrantly violated this Court's often repeated directive that the "District Court has discretion in determining the amount of a fee award." *Hensley v. Eckerhart,* 416 U.S. at 437. (A. 25). Without ever determining that the District Court's fact-finding was clearly erroneous, the Court of Appeals required the District Court to raise the hourly rates awarded to Mr. Williams and Mr. Dinkins and to consider pre-1972 fees because the 1971 HEW plan was not a final one. Such holdings obliterate the functions of the two levels of the federal judiciary, remove the decisions from the District Court which is most familiar with the various elements thereof, and unnecessarily prolong attorneys' fees litigation.

As Judges Kennedy and Wellford recognized in their separate opinions (A. 17 and 23), the Court of Appeals totally ignored the myriad of lawyers who testified as to prevailing rates in Nashville, Tennessee, a necessary inquiry in light of this Court's recent opinion in *Blum v. Stenson,* ____ U.S. ____, 79 L.Ed.2d 891 (1984). According to the majority's opinion, such inquiries are apparently superfluous — the rate awarded *must be* the plaintiffs' lawyers' current billing rate — in this case for Mr. Williams $120.00 per hour. It did not matter that the prevailing rate among respected and experienced members of the Nashville Bar in December, 1982 was closer to $100.00 per hour, the rate awarded by the District Court for Mr. Williams' services.[28] It did not matter, as Judge Kennedy noted, that Mr. Williams had

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[28] *See* Transcript, December 6, 1982: testimony of Thomas W. Steele, p. 207, exhibit 5; testimony of Charles Hampton White, p. 204, exhibit 4; testimony of Ward DeWitt, pp. 152-153, exhibit 3; testimony of John Hollins, p. 224, exhibit 6; testimony of George Barrett, p. 360. Mr. DeWitt testified that he often charged much less to his volume clients, p. 154.

only begun charging $120.00 per hour less than a year before the 1982 hearings. (A. 23). It did not matter that from 1977 to the date of the hearings, fees paid to defendants' counsel ranged from $75.00 per hour in 1978 to $95.00 per hour in 1982 for Mr. Willis, and $50.00 per hour in 1978 to $75.00 per hour in 1982 for Ms. Harrison.[29] It did not matter that Mr. Dinkins had no personal hourly rate, but that the testimony showed the fair value of his services to be somewhere between $50.00 to $75.00 per hour.[30] It did not matter that the fees applied by the District Court ($100.00 for Mr. Williams and $60.00 for Mr. Dinkins) were applied to all hours compensated from 1972 to 1983, during which period, as Judge Wellford graphically points out, hourly rates were much lower. (A. 25-28). It did not matter that the time compensated was based totally upon reconstructed time, a practice this Court has previously criticized, *Hensley v. Eckerhart*, 461 U.S. 424, 437, 441-42 (1983),[31] and that the District Court nevertheless added on a 25% multiplier.

The Court of Appeals' cavalier handling of the hourly fee question underscores its further usurpation and torturing of the District Court's fact-finding relative to the finality of the 1971 order. Never did the Court of Appeals consider that a massive busing order affirmed pursuant to *Swann v. Charlotte-*

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[29] Exhibit 17 to hearings of December 6, 1982.

[30] *See* Transcript of December 6, 1982; testimony of Ward DeWitt ($50.00 per hour), p. 154; testimony of Cecil Branstetter ($60.00 to $70.00 per hour), p. 126; testimony of John Hollins ($65.00 to $75.00 per hour), p. 224, *See also* testimony of Mr. Dinkins, Transcript, December 6, 1982, pp. 312-315.

[31] Significantly, no court has recognized that plaintiffs' counsel charged more than $14,000.00 in fees for reconstructing time records, for which, along with other time spent, plaintiffs sought a 100% multiplier. Transcript, December 6, 1982, p. 260. The District Court did not eliminate this time.

Mecklenburg had been in place for twelve years at the time of the fee hearings. Never did the Court of Appeals acknowledge that the 1971 plan was ordered changed only because changes in population and adverse effects had directly resulted from the plan itself over the intervening decade. 479 F.Supp. at 123 (S.A. 45). Never did the Court of Appeals acknowledge that its own panel had clearly viewed the 1971 plan as a final order when it had stayed the implementation of the District Court's new plan in 1981, only two days before school was to start with the following language:

> And concluding...that where (as here) after many, many years a *final school desegregation order* has been entered in the District Court, and appealed to this Court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought.

Kelley v. Metropolitan County Board of Education, No. 81-5370 (6th Cir. August 19, 1981) (S.A. 156) (Emphasis supplied).

Rather, in all instances the Sixth Circuit majority has begun, without examining the extensive record or the specific findings made by the District Court, with the proposition that the award of $139,500.00 in fees was "inadequate." (A. 16). From that proposition alone the Court of Appeals set about determining how that fee could be raised without reference to the District Court's fact-finding or deference to its intimate knowledge concerning its own proceedings.

Nowhere is the error in this approach more glaring than in the Court of Appeals' opening remarks that the $139,500.00 constituted less than ten percent of the amount requested, a disturbing statement at best when the bill presented by the plaintiffs is closely examined. The $1.4 million fee request was bottomed on

rates for Mr. Williams and Mr. Dinkins that were *four times* the prevailing rates in Nashville, Tennessee — $490.00 for Mr. Williams and $240.00 for Mr. Dinkins taking into account the requested 100% multiplier.[32] Similarly, the Court of Appeals' effort at comparing attorneys' fees paid defendants' attorneys is problematic, since the Court simultaneously failed to recognize that for the same period during which defendants' counsel were paid for their hourly time expended, plaintiffs' counsel were awarded almost their full request in terms of hours minus a small amount for time spent with an expert witness whose testimony they repudiated before the Court of Appeals and this Court. 558 F.Supp. at 478-79 (A. 60-62).[33] These examples are merely indicative of the reasons why this Court has given the District Court wide berth in attorneys' fees cases.

This Court recently re-emphasized the wide discretion vested in the District Court in determining the amount of a fee award. The reasoning behind this balancing of roles was deemed to be

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[32] *See* Exhibit 13 to December 6, 1982, hearings.

[33] The only hours subtracted by the District Court outside of the appellate and final order issues considered previously were 10% for duplication (offset by the 25% enhancement) and a small amount of time spent with Dr. Hugh Scott, whose neighborhood school approach the plaintiffs abandoned on appeal. (A. 60-62).

The Court of Appeals further attempted to compare fees paid to defendants' counsel to those awarded plaintiffs' counsel in n. 8, A. 16. Here the Court also failed to note that the Board of Education developed three desegregation plans during this period, held hundreds of hours of public hearings thereon which the school board's attorneys were required to attend, and actively pursued a time-consuming third party complaint against several state defendants which is now on appeal. Accordingly, while the defendants' lawyers did bill more hours for their time during the same period compensated the plaintiffs, their tasks were not comparable to those of the plaintiffs and they also billed at a significantly lower rate than did the plaintiffs' attorneys.

"the District Court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Here, the District Court demonstrated unequivocally its grasp of the litigation and its full consideration of the record before it in making its award. In contrast, the Court of Appeals has opted for a generalization. If this type of review is allowed to stand and to continue, the District Court's function in the Sixth Circuit, and perhaps in other Circuits, will be forever usurped, and appellate review will be the rule rather than the exception in attorneys' fees litigation.

CONCLUSION

This Court has stated that a "request for attorneys' fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In arriving at this policy statement the Court has underscored the District Court's discretion in reviewing and characterizing the proceedings and work before it, in view of the District Court's intimate familiarity with its own proceedings. *Id.*

The Sixth Circuit's opinion in this case is worthy of review because it misconstrues the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, and in so doing comes into conflict with at least one decision of this Court, *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), and with several circuit court opinions. Perhaps most importantly, however, the Sixth Circuit's opinion, if allowed to stand, has increased exponentially the inevitability of protracted attorneys' fees litigation. It has done so by removing the Court of Appeals' first hand control over appellate fees through its power to award its own costs, by permitting the reopening of a final desegregation order which settled all issues then pending, and by usurping the District Court's discretion to examine its own proceedings and local fee standards to award fees at the trial level.

As Judge Wellford stated in his opinion, "I dissent because I believe Judge Wiseman acted fairly and within the bounds of his sound discretion and applied the law reasonably to the facts of the case." (A. 28). If the Sixth Circuit's opinion is permitted to stand, such a result will never be sufficient to withstand appellate scrutiny, particularly in protracted civil rights cases.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing petition has been mailed to Mr. Avon Williams, 203 Second Avenue North, Nashville, TN 37201; Mr. Theodore Shaw, NAACP Legal Defense Fund, 99 Hudson Street, 16th Floor, New York, NY 10013; and Mr. Stephen Nunn, Deputy Attorney General, 450 James Robertson Parkway, Nashville, TN 37219 on this 19th day of November, 1985.

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.
Attorneys for Peteitioners

APPENDIX

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APPENDIX A

Nos. 83-5175, 5243

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Robert W. Kelley et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

Metropolitan County Board of
Education, et al.,
Defendants-Appellees,
Cross-Appellants.

On Appeal from the
United States District
Court for the Middle
District of Tennessee.

Decided and Filed September 23, 1985

Before: LIVELY, Chief Judge; ENGEL, KEITH, KENNEDY, MARTIN, CONTIE, KRUPANSKY, WELLFORD and MILBURN, Circuit Judges; and EDWARDS and CELEBREZZE, Senior Circuit Judges.[1]

KRUPANSKY, Circuit Judge, delivered the opinion of the court in which LIVELY, C.J., KEITH, MARTIN, CONTIE and MILBURN, JJ., joined. KENNEDY, J., (pp. 17-23) delivered a separate opinion, concurring in part and dissenting in part in which ENGEL and WELLFORD, JJ., joined, with WELLFORD, J., (pp. 24-29) also

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[1] The court's decision to review the instant case *en banc* effectively vacated the prior Sixth Circuit opinion on this case which was printed at 755 F.2d 67 (6th Cir. 1985).

delivering a separate opinion, concurring in part and dissenting in part.

KRUPANSKY, Circuit Judge. Plaintiffs Robert W. Kelley and the class he represents appealed and defendant Metropolitan County Board of Education (Board) cross-appealed the district court's award of attorney's fees in this school desegregation case.

Commencing on the heels of the landmark case of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the instant case has spawned volumes of court opinions and orders at both the district and appellate levels. These decisions need not be recounted in detail here. *See, e.g., Kelley v. Metropolitan County Board of Education,* 687 F.2d 814 (6th Cir. 1982), *cert. denied,* 459 U.S. 1183 (1983); *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972); *Kelley v. Metropolitan County Board of Education,* 511 F.Supp. 1363 (M.D. Tenn. 1981). Suffice it to say that the litigation undoubtedly required hundreds of hours of work by the plaintiffs' and Board's attorneys.

The plaintiffs' initial motion for attorney's fees, pursuant to the Educational Amendments of 1972, 20 U.S.C. § 1617, was filed on February, 8, 1974. Subsequent filings amended the pending motion to include a prayer for relief under the 1976 Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. In December, 1982, the trial court conducted hearings on the issue of attorney's fees. On February 23, 1983, the court awarded plaintiffs' fees and costs of approximately $139,500 or less than ten percent of the amount requested.[2] The discrepancy between the amount requested and that awarded formed the basis of plaintiffs' appeal.

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[2] In its motion for attorneys fees, plaintiff requested the following amounts for services rendered in the 28-year history of the case:

(1) Avon Williams, for the firm of Looby and Williams, 917.8 hours at $200 per hour and 36.4 days at $1,500 a day, totaling

Specifically, plaintiffs alleged error in the district court's refusal to award attorney's fees for services rendered prior to 1972, for declining to award fees for appellate services, and for abusing its discretion in calculating the daily and hourly rates of plaintiffs' attorneys Avon Williams and Richard Dinkins. The defendant Board's cross-appeal challenged the district court's failure to discern the specific extent to which plaintiffs prevailed on each of their claims, and in holding the Board liable for services required by plaintiffs' attorneys due to the intervention of third parties.

The district court's denial of attorney's fees for services performed prior to 1972 was predicated on the court's determination that a 1971 desegregation order, entered by the district court and approved by the Sixth Circuit, was a "final order" which terminated entitlement to attorney's fees under this court's mandate in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

In *Northcross, supra,* this court cautioned that although attorney's fees could be awarded retroactively in all desegretation cases pending at the date of § 1988's enactment, such retroactive relief was not automatic. The court stated:

> This is not to say that a retroactive award of attorney's fees must be made in all school desegregation cases. Certain interim aspects of the case may have been subject to a final order settling the issue of attorney's fees to that point,

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$238,160 plus a 100 percent contingency factor for a total of $476,320;

(2) Avon Williams, individually, 1,211.5 hours at $200 per hour and 87.3 days at $1,500 a day, totaling $372,250 plus 100 percent contingency factor for a total of $746,500;

(3) Richard Dinkins, individually, 215.6 hours at $120 per hour and 38 days at $1,500 a day, totaling $82,872, plus a 100 percent contingency factor for a total of $165,744.

An additional $126,000 was requested for work performed by Legal Defense Fund attorneys.

> rendering the reopening of long-settled aspects of the case unfair.

611 F.2d at 635.

Based on the above guidance, the *Northcross* district court held on remand that a 1966 consent order entered in the Memphis school desegregation case constituted a final order, thus barring an award of attorney's fees for work completed prior to 1966.

In the instant case, the court below concluded that the 1971 order of the district court, affirmed in *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972), constituted a "final order" as did the 1966 consent decree at issue in *Northcross.* This court, however, is not persuaded by that conclusion.

In upholding the lower court's sanctioning of the HEW plan in 1972, this circuit initially observed:

> The order of the District Judge is the first comprehensive and *potentially effective desegregation order* ever entered in this [17 years of] litigation. The District Judge tells us that now *the remedy is at least in sight.*

463 F.2d at 734.

Consequently, this court observed in 1972 that the only issues of substance presented in that appeal were the "practical problems which appellants claim have developed since the entry of the district judge's [1971] order", 463 F.2d at 744, such as the lengthy bus rides to which youngsters were subjected as part of the desegregation plan. However, the Sixth Circuit directed the parties to seek a remedy for these problems in the district court. The court instructed:

> As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims are presented in a trial court, with an oppor-

> tunity for sworn testimony to be taken and controverted issues of facts decided by the processes of adversary hearing, this court has no jurisdiction.

463 F.2d at 744-745.

The 1972 Sixth Circuit opinion further related that documents included in the appellate record suggest "that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge," 432 F.2d at 745. The 1972 appellate decision thus concluded:

> The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been) to the parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future.

463 F.2d at 747.

Thus, it is clear that the Sixth Circuit did not view the 1971 order as signaling the termination of the litigation. Moreover, the record is replete with disclosures that the plaintiffs, as well as defendants, have continously engaged in adversary proceedings of magnitude in conjunction with the modification and implementation of the 1970 plan with charges and countercharges of asserted disparate treatment of black children.[3] As

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[3] For example, on October 21, 1971, plaintiffs moved to join the metropolitan government, mayor and council members as parties due to the control these officials exhibited over the financial resources necessary to implement the transportation aspect of the plan; on March 17, 1972, the Board submitted its second report to the court in which it suggested, *inter alia*, plans for a new high school and a capital improvement schedule for schools which were at least 15% black; in June, 1972, the Board sought changes in the 1971 plan concerning elementary and junior high school attendance zones which plaintiffs opposed while reiterating their claims that the plan in effect had a

recently as 1982, this circuit again remanded the case, concluding that "[i]n large measure, the pupil assignment components of this plan do not withstand constitutional scrutiny." *Kelley,* 687 F.2d at 817.

In view of the foregoing, it is quite apparent that the 1971 district court's disposition and this court's subsequent 1972 affirmance of that decision, did not represent a distinct break in the litigation. Accordingly, as envisioned by the Sixth Circuit in *Northcross,* an award of fees for legal services performed and accrued prior to 1972 is appropriate.

The trial court having initially disallowed attorneys fees for the period between the inception of this action on September 23, 1955, and May 30, 1972, is directed upon remand to conduct hearings and award attorneys fees for services performed at the trial and appellate levels by determining and applying the prevailing daily hourly rate, daily in-court time, and other awardable fees for each year of the period involved.

Plaintiffs have also challenged the trial court's refusal to award attorney's fees for services performed by their counsel at the appellate level. Compensation was sought, *inter alia,* for appellate services which culminated in this court's 1972 and 1982 *Kelley* opinions. *See,* 463 F.2d 732, 687 F.2d 814.

The court below predicated its denial of legal fees for the appellate litigation on *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982). In *Buian,* the court announced that the award of costs to a litigant pursuant to the Federal Rules of Appellate Procedure was an absolute prerequisite to the award of attorney's fees under § 1988 for services resulting from the pursuit of appellate

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disparate impact on black children; and on May 20, 1973, the Board petitioned for approval of its "Long Range Building Program". In sum, the district court's docket sheet evinces a steady stream of activity from the initiation of this litigation to the date of the present appeal.

review. Because costs were not awarded by this court to the plaintiffs at the conclusion of the various appellate proceedings entertained by this court, the district court applying *Buian* barred compensation for their attorneys' services.

Upon a reconsideration of *Buian* and its mandates, this court concludes that an award of costs pursuant to Fed.R.App.P. 39(a)[4] is separate and distinct from and totally unrelated to an award of attorney's fees pursuant to the directions of § 1988. Accordingly, *Buian* is hereby overruled. While it is true that § 1988 expressly states that attorney's fees "*may* be awarded as part of costs," neither the legislative history nor the express language of § 1988 mandates the conclusion expressed in *Buian*.[5] *See, Robinson v. Kimbrough,* 620 F.2d 468, 474 (10th

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[4] While Fed.R.App.P. 39(a) sets forth general guidelines for the award of costs on appeal, governing such items as the copying of briefs, appendices and records, it also allows the appellate tribunal wide discretion in reimbursing a party for its expenses. The rule states in pertinent part:

> **Rule 39. Costs**
>
> **(a) To whom allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

[5] The dissent's argument that *Buian's* pronouncements are supported by cases such as *Hutto v. Finney,* 437 U.S. 678 (1978) and *Marek v. Chesney,* 53 U.S.L.W. 4903 (June 27, 1985) is not persuasive. *Hutto* simply determined that attorney's fees may be classified as "costs," and as such, are not subject to eleventh amendment immunity which normally bars monetary damage awards when a state is the defendant in a civil rights action. Similarly, the Court in *Marek,* after reviewing the legislative history, purpose and express language of § 1988 and Fed.R.Civ.P. 68 respectively, concluded that Congress intended the Rule 68's cost sanctions, which are

Cir. 1980) (pre-*Buian* decision expressly rejecting the approach advocated in *Buian*). *See, e.g., Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159, 173 (5th Cir. 1978) (*en banc*), *aff'd* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (recognizing circuit court's discretionary power to award costs and fees arising from appeal pursuant to Rule 39 but remanding to district court as proper forum to determine total cost and fees, including attorney's compensation, for prevailing party in that case); *Willie M. by Singer v. Hunt,* 564 F.Supp. 363 (W.D. N.C. 1983), *aff'd as modified,* 732 F.2d 383 (4th Cir. 1984) (specifically rejecting *Buian* rationale). To the contrary, the relevant inquiry is simply whether the party seeking compensation substantially prevailed at the appellate level. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (restating the general rule that prevailing plaintiff should ordinarily recover an attorney fee in civil rights

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mandatorily-imposed upon a party who refuses a settlement offer and who subsequently fails to recover a final judgment greater than the offer, to include attorneys's fees. In determining that the cost-shifting provision of Rule 68 encompasses an award of attorneys fees under § 1988, the *Marek Court,* in footnote 2, distinguished its prior opinion in *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980). The Court observed that, unlike Rule 68, the cost provision at issue in *Roadway* (28 U.S.C. §§ 1920 and 1927) specifically enumerated the type of costs awardable as sanctions under certain circumstances, thus making it inappropriate for the Court to interpret "costs" as including § 1988 attorney's fees. In other words, the *Marek* Court recognized a critical distinction between interpretation of "costs" where the relevant statute sets forth its own definition of the term, as opposed to situations where "costs" are undefined. As appellate Rule 39 specifically delineates the "costs" to which it applies, i.e. the "traditional" costs of printing briefs, appendices, records, etc. the pronouncements of *Marek* render it inappropriate for this court to judicially-amend Rule 39's cost provisions to include § 1988 attorney's fees. In sum, neither *Hutto* nor *Marek* addressed the narrow issue presented by *Buian,* to wit, whether the appellate court's discretionary decision to award or deny costs pursuant to Fed.R.App.P. 39 should be considered an absolute prerequisite to the prevailing party's § 1988 entitlement to attorney's fees for legal services rendered at the appellate level.

cases). Consideration and disposition of this critical issue is pragmatically left to the forum of the trial court. *Northcross*, 611 F.2d at 637. *See also, Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982); *Taylor v. Ouachita Parish School Bd.*, 648 F.2d 959 (5th Cir. 1981); *Molina v. Richardson*, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978).[6]

In addition to challenging the lower court's exclusion of time accrued for pre-1972 and appellate work, plaintiffs urge that the hourly and daily rates awarded by the lower court for legal services rendered subsequent to May 30, 1972, by Avon Williams and Richard Dinkins were inadequate. Compensation at the rate of $200 per hour and $1,500 per day in court was requested for Williams, and $120 hourly and $1,500 per day sought for Dinkins' services. Subsequent to evaluating the prevailing rate charged by experienced and skillful lawyers in the Nashville area, the court below determined that the market rate in federal court litigation for an attorney of Williams' experience, ability and stature was $100 per hour and $1,000 per day of trial. The rate for Dinkins, who was introduced into the case upon gaining admission to the bar, was $60 per hour and $600 per day in court. The court also rejected plaintiffs' prayer for a 100 percent contingency factor, but approved a 25 percent upward adjustment to compensate for the difficulty of the prolonged litigation and its unpopularity in some sectors of the community. The court then reduced the amount 10 percent to account for duplication of services and possible miscalculations in the attorneys' reconstruction of their time records.

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[6] Contrary to the concerns articulated by the dissent, the majority does not foresee its opinion as impacting or overruling the decision in *Johnson v. Snyder*, 639 F.2d 316 (6th Cir. 1981) (per curiam), as *Johnson* merely concluded that since § 1988 attorney's fees may be considered as part of costs, the filing of petition for attorney's fees is not governed by the time limitations of Fed.R.Civ.P. 59 for motions to alter or amend the judgment or for a new trial.

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), the Fifth Circuit listed 12 factors to be considered in determining an appropriate award of attorney's fees. These factors include, *inter alia*, the time and labor required, the novelty and difficulty of the litigation, the customary fee, and the experience, reputation and ability of the attorneys. In *Northcross*, this court observed that *Johnson* did not provide guidance as to the relative weight to be accorded each factor, and suggested that "an analytical approach" be applied. *Northcross* instructs:

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all of the relevant factors and will lead to a reasonable result. The number of hours of work automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and the "experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesireability" of the case.

611 F.2d at 642-43.

Fairly read, *Northcross* advises that the attorney's normal hourly billing rate should be a key focal point in award determinations. In the recent case of *Blum v. Stenson*, ____ U.S. ____, 104 S.Ct. 1541 (1984), the Supreme Court further instructed that "reasonable rates" are to be determined under § 1988 "according to the prevailing market rates in the relevant community." 104 S.Ct. at 1547.

In contesting the $100 per hour award to Williams, plaintiffs cited testimony adduced at the hearing on the motion for fees evincing (1) Williams' reputation as an experienced and successful civil rights lawyer; (2) that "customary fees" for similar

work in the Nashville area ranged from $100 to $200 an hour; (3) that Williams hourly fee for office work was $120; and (4) that the unpopularity of the case has resulted in threats against Williams. Testimony that the standard fee for someone of Dinkins' stature was $65 to $130 an hour was also cited to support plaintiffs' contention that Dinkins' award was inadequate. In addition, plaintiffs recounted the unpopularity and length of the litigation in arguing that the contingency fee should be higher than the 25 percent awarded by the court below.

Considering in tandem the pronouncements of the Supreme Court and Sixth Circuit delineating the correct method for caluclating attorney's fees, this court concludes that Williams is entitled to at least a minimum rate of $120 per hour. This amount is a reasonable point of departure in calculating Williams' hourly rate in accordance with prevailing Supreme Court and this circuit's directions and is within the parameters of the evidence that "customary fees" for similar work in the Nashville area ranged between $100 and $200 an hour. The award to Dinkins must also be reconsidered using as a minimum point of departure an amount of $65 per hour as the prevailing value of his skills in the Nashville legal community. The daily (in court) rate for Williams and Dinkins should also be upgraded to $1,200 and $650 respectively.

The lower court's overall reduction of fees by 10 percent for duplication of services is justified under the holdings of *Weisenberger v. Huecker*, 593 F.2d 49, 54 (6th Cir. 1979) and *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 715 n.2 (6th Cir. 1976) (per curiam). In addition, the Supreme Court recently approved a 30 percent overall reduction in a case, like the one at bar, where the attorneys failed to keep contemporaneous time records and thus had to reconstruct them from memory. *See Hensley v. Eckerhart*, 461 U.S. 424, 428, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). However, the reduction in *Hensley* was also designed to compensate for the attorney's inexperience. Thus, the 10 percent reduction in the instant case is reasonable and should not be disturbed.

Plaintiffs also challenged the district court's refusal to award fees for the two days and seven hours plaintiffs' attorneys attributed to discussions with Dr. Scott, the plaintiffs' expert witness at the 1979 and 1980 hearings. The court's opinion was based on its finding that Dr. Scott's testimony was frivolous under *Northcross,* 611 F.2d at 636, in light of plaintiffs' repudiation of much of Dr. Scott's testimony after the court had admitted it. The district court's conclusion in this respect is proper.

In its cross-appeal, the defendants alleged that the trial court erred in failing to exclude fees for services rendered by plaintiffs' attorneys arising from claims and proceedings stemming from the intervention or joining of other parties. These "outside" parties were:

1. The Metropolitan (Nashville/Davidson Co.) Mayor and Council, which plaintiffs joined as defendants in 1972. (Plaintiffs prevailed in their effort to enjoin these defendants from interfering with the desegregation plan.)

2. The intervention by the Board itself as a third party plaintiff in 1973 to present its claim against third-party defendant HEW.

3. A group of otherwise unidentified "intervenors" who proposed a desegregation plan to the district court in 1979.

4. Another unidentified group of intervenors who entered the case to propose the creation of a magnet school.

The defendant Board further noted that it vehemently opposed the intervention of the third and fourth group of intervenors listed above.

Plaintiffs responded to the Board's argument on this issue by observing that it was the Board's failure to dismantle its dual

school system that occasioned the interventions and prolonged the litigation in this lawsuit.

Defendants relied primarily on *Haycraft v. Hollenbach,* 606 F.2d 128 (6th Cir. 1979) (per curiam) for the proposition that plaintiffs should look to the intervenors, rather than the defendant, for expenses occurred as a result of the intervention. However, *Haycraft* is distinguishable from the instant case in several important respects.

In *Haycraft,* L. J. Hollenbach, a county judge of Jefferson County, Kentucky, intervened on behalf of "all the people of Jefferson County" in a desegregation case pending in federal court. The judge proposed an alternative desegregation plan which protracted the litigation and resulted in several appeals. Following the appeals, the original plaintiffs sought an award of attorney's fees to be assessed against the intervenor pursuant to the Emergency School Aid Act of 1972, 20 U.S.C. § 1617. In granting the order, the district court held the $11,312 award against the intervenor appropriate, as plaintiffs would have saved countless hours were it not for the intervenor. On appeal, this circuit affirmed the award, holding that the plaintiffs became the "prevailing party" as regarded Hollenbach "when the district court rejected his desegregation plan and dismissed him as an intervenor." 606 F.2d at 132.

Thus, the award assessed against the intervenor in *Haycraft* was predicated on the court's finding that the intervenor obstructed rather than aided in the developement of the court-ordered desegregation scheme. The award was also sought by the plaintiffs directly from the intervenor. In the instant case, there is no evidence that the intervenors in any way interferred with the progress of the litigation, and thus plaintiffs would not, under the *Haycraft* analysis, be entitled to remuneration *from the intervenors.* The question remains, of course, whether the plaintiff is entitled to attorney's fees *from the Board* for the extra time which the plaintiffs' counsel devoted to issues raised by the intervenors.

There appears to be no case which directly resolves this issue. Common sense dictates that the Board should not be held liable for the costs plaintiffs incurred in seeking an injunction against the Metropolitan Mayor and Council, as that group was itself a third-party defendant, unrelated to the Board. Thus, if any party is liable for those expenses, it would be the Metropolitan government and not the Board. As to the other intervenors, however, (i.e. the Board itself as a third-party plaintiff, the group which proposed a desegregation plan in 1979, and the advocates of the magnet school) plaintiffs' argument that the Board's failure to dismantle its dual school system caused the intervention is persuasive. Thus, plaintiffs are entitled to compensation from the Board for all legal services except those resulting from plaintiff's addition of the Metropolitan mayor and Council as third-party defendants.

Defendant's final argument on cross appeal was that the court erred in not determining the specific extent to which plaintiffs had prevailed in the action. The defendant contended that while the court's focus on the "overall results" of the case was sufficient to satisfy the "prevailing party" requirement as defined by this circuit in *Northcross,* a recent Supreme Court decision has changed the standard. Defendant cites *Hensely v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) for the proposition that the *Northcross* approach has been modified, and that awards under § 1988 now require that a party's request for attorney's fees be carefully scrutinized as to the extent of success on each claim, and further, that time spent on unsuccessful claims that are distinct from successful claims should be excluded in determining a reasonable fee.[7] Thus,

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[7] Specifically, defendant alleged that plaintiffs have been erroneously awarded fees for time spent pursuing unsuccessful charges of contempt against the Board, yet unresolved matters as to faculty composition, and their effort to keep Pearl High School open.

defendant suggested that under the mandate of *Hensley,* the case should be remanded with instructions to examine the extent to which plaintiffs have prevailed on each substantive issue before awarding fees. The court agrees.

In *Hensley,* plaintiffs brought a lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Missouri. The complaint challenged the treatment and conditions at the Forensic Unit presenting a wide variety of alleged constitutional infringements. The court found constitutional violations in five or six general areas cited in plaintiffs' complaint: physical environment; individual treatment plans; least restrictive environment; visitation, telephone and mail privileges; and seclusion and restraint. However, it found the sixth general area, staffing, to be sufficient.

In ruling on an attorney's fees motion, the *Hensley* district court first determined that plaintiffs were prevailing parties even though they had not succeeded on all six claims, and further refused to eliminate from the award hours spent on the unsuccessful claim. The Supreme Court reversed and remanded, reasoning that two questions must be addressed when a motion for attorney's fees is presented in a case involving numerous claims: (1) did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?; and (2) did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? 461 U.S. at 434; 103 S.Ct. at 1940.

However, *Hensley* does not, as defendant suggested, represent a *total* break from the approach taken regarding the "prevailing party" issue by this circuit in *Northcross.* Rather, the *Hensley* court noted that in some cases, the litigation cannot be "viewed as a series of discrete claims." *Id.* In such a case, the Court stated, the *overall result* would remain as the primary factor in determining attorneys fees.

The *Hensley* court instructs:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtainted by the plaintiff in relation to the hours reasonably expended on the litigation.

461 U.S. at 435, 103 S.Ct. at 1940.

On remand, the district court must follow the mandates of *Hensley* as explicated above.

In sum, this court finds the amounts awarded by the lower court inadequate.[8] This case is therefore remanded to the district court with instructions to award fees for services performed by plaintiffs' attorneys prior to 1972; award fees for appellate work; reevaluate the hourly rate to be awarded to Williams and Dinkins for the period subsequent to May 30, 1972 in accordance with the direction of this decision; reevaluate the court time for Williams and Dinkins with a minimum departure point of $1,200 and $650 respectively for the period subsequent to May 30, 1972; decrease the award for the time spent by plaintiffs' attorneys to bring in the city government as a third party defendant; follow the mandate of *Hensley* to determine which claims plaintiffs have succeeded upon and those which they have not, and to calculate the at-

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[8] This court also notes that the *entire* amount awarded to plaintiffs' attorneys for 28 years of service in this case was less than one-half of the $288,000 which the Board paid its attorneys to defend against the litigation in just one five-year period, i.e. 1978-1982.

torneys' compensable hours accordingly; allow a 25% increase as a contingency factor; and decrease the overall award by 10% for duplication of services and the reconstruction of time records from memory.

In view of the foregoing, this case is Reversed and Remanded. Costs awarded to plaintiffs.

. KENNEDY, Circuit Judge, concurring in part and dissenting in part, joined by ENGEL and WELLFORD, JJ. I concur in the court's holding that the 1971 desegregation order did not constitute a distinct break in the litigation. I dissent, however, from the majority's decision to overrule *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982). I remain convinced that the award of costs on appeal is a prerequisite to the award of appellate attorney fees under 42 U.S.C. § 1988.

The statutory authorization for attorney fees in civil rights cases provides that

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

Traditionally, the Supreme Court, the courts of appeals and the district courts each issue cost awards only for the proceedings within their own sphere. Rule 39(a) of the Federal Rules of Appellate Procedure governs the award of costs on appeal. It provides that costs shall be awarded to the prevailing party, unless otherwise ordered. Where each party prevails in part, costs are allowed only as ordered by the court. Normally, a prevailing party receives costs and a partially prevailing party

receives partial costs.[1] In the rare situation where the appellate court disallows costs entirely, the court very likely has a good reason for doing so, a reason which may or may not be apparent to the district court when it decides the subsequent motion for attorney fees. I do not see how we can allow a district court the discretion to award appellate attorney fees "as part of the costs" when we have refrained from awarding costs.[2]

Moreover, I do not see how we can, consistent with the Eleventh Amendment, allow an award of attorney fees against a state other than as part of costs. Section 1988 does not expressly abrogate Eleventh Amendment immunity, *cf. Atascadero State Hospital v. Scanlon,* 105 S.Ct. 3142, 3148 ("Congress must express its intention to abrogate the Eleventh Amendment in un-

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[1] If there is an appeal and a cross appeal and the plaintiff prevails on one and loses on the other, costs would ordinarily be awarded only on the successful appeal. Although the attorney's servcies could not readily be divided, under *Hensley v. Eckerhart,* 461 U.S. 424 (1983), the fee award could be reduced according to the degree of success. This need not involve the courts of appeals in determining the amount of the fees. The court need only state in its award of costs that attorney fees should be reduced by the appropriate percentage because of the limited success.

[2] I am not insensitive to the harshness of disallowing attorney fees in the instant case because of the absence of cost awards. I do not know why the panels in the 1972 and 1982 *Kelley* decisions ordered each party to bear its own costs on appeal. Appeliants prevailed on the school district's appeal in 1972 and also prevailed in 1982. If it was through inadvertence, or through a perception that each party had partially prevailed and the costs balanced out, the cost issue could have been made the subject of a motion for rehearing by appellants, in anticipation of seeking attorney's fees. Appellants never filed such a motion. The 1982 *Kelley* case, however, was decided six weeks prior to *Buian* and appellants might reasonably not have realized what the failure to award costs portended for their impending attorney's fee motion. Because of the harshness of the result, we might decline to apply *Buian* in the present case. I would prefer this approach to the majority's discarding of *Buian.*

mistakable language in the statute itself"), and the Supreme Court has upheld § 1988 fee awards against states only because they are part of costs:

> The Act imposes attorney's fees "as part of the costs." Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.
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> . . . .
>
> Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs.
>
> There is ample precedent for Congress' decision to authorize an award of attorney's fees as an item of costs... It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the State's immunity.

Hutto v. Finney, 437 U.S. 678, 695-98 (1978) (citations and footnotes omitted).

As recently as this term, the Court has shown that it regards the "as part of the costs" language as more than mere surplusage. In *Marek v. Chesny*, 105 S.Ct. 3012, the Court held that the "costs" contemplated by Federal Rule of Civil Procedure 68 — which shifts to the plaintiff all costs incurred subse-

quent to a rejected settlement offer which is not exceeded by the eventual recovery — include attorney's fees awardable under § 1988. Plaintiffs in *Marek* had rejected a $100,000 settlement offer in their § 1983 suit, and subsequently won only a $60,000 judgment. Thus, under Rule 68, plaintiffs could not recover "costs" incurred during the period after the settlement offer. Plaintiffs nonetheless sought attorney's fees for that period. The Court ruled that since § 1988 defined attorney's fees as costs, fees could not be awarded for any period for which costs were not awarded:

> Pursuant to . . . § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." Since Congress expressly included Attorney's fees as "costs" available to plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68.

105 S.Ct. at 3017.

In dissent, Justice Brennan argued that it was wrong to let a determination of attorney's fees, which is governed by a reasonableness standard, be subordinated to and subsumed by a rule on costs, which may have a much more mechanical application. 105 S.Ct. at 3020-21. In the instant case, I take it that essentially this sentiment underlies the majority's decision to reverse *Buian*. But the Supreme Court rejected that argument in favor of the "plain language" view that since attorney's fees are defined as part of costs, they cannot be separately awarded where costs are not awarded.

Notwithstanding all of this, the majority, with an absence of analysis and a dearth of support, "concludes that an award of costs pursuant to Fed.R.App.P. 39(a) is separate and distinct from and totally unrelated to an award of attorney's fees pursuant to the directions of § 1988." The majority adds that "[w]hile it is true that § 1988 *expressly* states that attorney's fees 'may be awarded as part of the costs,' neither the legislative history *nor the express language* of § 1988 mandates the conclu-

sion expressed in *Buian.*" (Emphasis added). I do not know what that "express language" mandates if not *Buian's* conclusion. The refusal to award costs precludes the award of any part of the costs, and the express language of section 1988 defines attorney's fees as part of the costs, as discussed in *Hutto* and *Marek*.

The majority cites two cases as support for rejecting the *Buian* approach. While the district court in *Willie M. by Singer v. Hunt,* 564 F. Supp. 363 (W.D.N.C. 1983), did explicitly reject *Buian,* the majority's subsequent history of *Willie M.* as "*aff'd as modified*" disguises the Fourth Circuit's partial reversal.

In *Willie M.,* the plaintiffs prevailed overall in a class action, but defendants prevailed on one issue — the scope of the class — which was the subject of an independent appeal. The appellate court awarded no costs on that appeal. Nonetheless, the district court allowed plaintiffs to recover attorney's fees, including fees for time spent on the lost appeal, because they had largely prevailed overall. The Fourth Circuit reversed that part of the decision and disallowed attorney fees for the lost appeal because plaintiffs had not prevailed — precisely the reason, of course, that costs had not been awarded. *See Willie M. v. Hunt,* 732 F.2d 383, 386-87 (1984). Thus, the Fourth Circuit reversed the district court on the very issue that brought *Buian* into play, albeit in such a way that the court avoided altogether a *Buian*-type question.

Not only was the *Willie M.* district court reversed,[3] but one of the cases it relied upon in rejecting *Buian* had been reversed by

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[3] In addition to *Willie M.,* the majority cites *Robinson v. Kimbrough,* 620 F.2d 468 (10th Cir. 1980), in which the court did allow an attorney's fee award where costs had been denied. Aside from my plain disagreement with the *Robinson* holding, it does not appear that a *Buian*-type question was squarely addressed by that court.

the Supreme Court. *White v. New Hampshire Department of Employment Security,* 629 F.2d 697 (1st Cir. 1980), had held that Fed.R.Civ.P. 59(e)'s time limit on motions to alter or amend judgments applied to motions for attorney's fees. The court rejected the argument that fees are more like costs than like part of the judgment and thus should be governed by Fed.R.Civ.P. 54(d), which contains no time limit.

The Supreme Court, however, reversed *White, see* 455 U.S. 445 (1982), holding that a motion for attorney's fees was not like a motion to alter or amend the judgment and so not subject to Rule 59(e). The Court declined, though, to rule specifically on whether a request for fees was an application for costs, as three circuits had held, *see Johnson v. Snyder,* 639 F.2d 316, 317 (6th Cir. 1981);[4] *Bond v. Stanton,* 630 F.2d 1231, 1234 (7th Cir. 1980); *Knighton v. Watkins,* 616 F.2d 795, 797-98 (5th Cir. 1980), or was a third kind of creature, related neither to costs nor judgment, as the Eighth Circuit had held in *Obin v. District No. 9 International Association of Machinists and Aerospace Workers,* 651 F.2d 574 (1981), and as the Ninth Circuit later held in *Metcalf v. Borba,* 681 F.2d 1183 (1982).[5]

It appears that the majority now tacitly adopts the *Obin* view that a claim for attorney's fees is not a request for costs nor part of the judgment but "a matter collateral to and independent of the merits of the litigation." 651 F.2d at 583. Justice Blackmun's concurring opinion in *White* called for the Court to go "one step further" and affirmatively adopt the *Obin* view rather than the "costs" view of *Johnson, Bond* and *Knighton.*

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[4] In *Snyder,* we held that "attorney's fees awarded under § 1988 are awarded as costs and are not controlled by the time limitations" of Rule 59(e). 639 F.2d at 317. The majority's opinion would seem necessarily to overrule *Snyder* as well as *Buian.*

[5] The *Willie M.* district court relied on *Obin* and *Metcalf* in addition to *White.*

See 455 U.S. at 455-56. Evidently, a majority of the Court was not willing to do that. Nor am I.

I also dissent from the holding that the District Court abused its discretion in awarding Mr. Williams an hourly rate of $100 for all hours since 1972. The evidence was that rates for attorneys with Mr. Williams' experience were from $100 to $200 per hour at or about the time of the hearing in 1982. However, $100 per hour was the generally prevailing rate. There was also undisputed testimony that rates generally were lower in the early and middle 1970's. The court relies on Mr. Williams' testimony that he charges $120 per hour. It overlooks his testimony that he began charging $120 per hour in January 1981. (App. at 783). Based on the evidence before it, I do not believe the District Court abused its discretion by adopting the $100 rate, although it might have been preferable to approve a lower rate for earlier years and a higher rate for later years.

WELLFORD, Circuit Judge. (Concurring in part and dissenting in part.) I concur with Judge Kennedy in her discussion and reiteration of the rationale of *Buian v. Boughard*, 687 F.2d 859 (6th Cir. 1982).

I concur in Judge Krupansky's opinion to the extent it approves of the district court's overall reduction of fees by 10 percent for duplicaiton of services. The opinion observes that a *larger reduction* under appropriate circumstances may be justified where there has been a failure "to keep contemporaneous time records." The fact that only a modest reduction was directed by the trial judge is evidence of a sensitive and understanding approach by him in considering all of the aspects of the attorney fee request in this case under standards set by the Supreme Court.[1]

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[1] "Where the documentation of hours is inadequate, the district court may reduce the award accordingly. The district court also should exclude from this initial fee caluclation hours that were not 'reasonably expended.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983).

I also concur in the court's judgment that the district court's conclusion properly refused to award fees for the period during 1979 and 1980 hearings when the essentially frivolous testimony of plaintiffs' expert witness, Scott, was discussed and produced but later repudiated. I agree, furthermore, that defendant Board should not be held liable for the costs plaintiffs incurred in seeking an injunction against the Mayor and Council, since the latter, if anyone, should be responsible, rather than defendant Board, for those expenses. In addition, I agree that there should be a remand to consider to what extent, if at all, plaintiffs should be considered "prevailing parties" on certain issues still pending, or in respect to charges or claims in which plaintiffs failed to succeed before the trial court (or this court). *See Hensley v. Eckerhart*, 461 U.S. 424 (1983) (a case in which some of plaintiffs' counsel participated as did the Attorney General of the State of Tennessee by amicus brief).[2] The district court, on remand, may find some of the claims made by plaintiffs essentially "unrelated" to those on which plaintiffs were found to prevail. *See Hensley*, 461 U.S. at 435. As the Supreme Court stated:

> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole time a reasonable hourly rate may be an excessive amount.
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> That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.
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[2] It should be noted that the successful plaintiffs' attorney in *Hensley* claimed nearly 3000 hours of time and requested a rate of *$40 to $65 an hour from 1975 through 1979.*

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for limited success. The court necessarily has discretion in making this equitable judgment.

Hensley, 461 U.S. at 436-37.

I respectfully dissent, however, from other portions of the majority opinion. I would hold *Buian v. Baughard*, 687 F.2d 859 (6th Cir. 1982) to be essentially sound in requiring a determination about allowance of costs as a condition for subsequent allowance of fees in civil rights attorney fee award requests. *Buian* is not inconsistent with the practice of pragmatic referral to the district court for determination of the reasonable amount of an attorney fee award in a proper case. *See Smith v. Detroit Board of Education*, 728 F.2d 359 (6th Cir. 1984). I would not overrule *Buian*, and I would affirm the judgment below to the extent that it applied *Buian* to reduce a portion of the fee request.

With regard to the hourly and daily rates awarded to counsel Williams and Dinkins, remembering that "the fee applicant bears the burden of establishing entitlement . . . and documenting the appropriate hours and hourly rates," and emphasizing that "the district court has *discretion* in determining the amount of a fee award," *Hensley*, 461 U.S. at 437, (emphasis added), I would affirm the district court's action as being within his sound discretion. Much of the fee award claim in this case goes back to services rendered a number of years ago when, in Tennessee, it was rare for an attorney in any case to claim an hourly or daily fee equal to that awarded by the district court in this case. It should be remembered that plaintiffs' attorneys are en-

titled only to an award for reasonable value of their services.[3] In perhaps this court's most frequently cited case dealing with attorney fees in a comparable school desegregation situation,[4] reference was made to an allowance of fees through 1977 to an experienced and successful civil rights lead counsel, Louis Lucas, who requested $75 an hour for services in a 1977 hearing. That same attorney, involved in numerous school desegregation cases in this Circuit (as has been Mr. Williams, one of the claimant's here), requested an hourly fee of $125 an hour for services in a 1978 hearing in the Memphis desegregation case. He was awarded $75 an hour by this court for non-courtroom time because the requested rate was found to be too high. *Northcross,* 611 F.2d at 641. In that same case, another experienced civil rights plaintiff attorney, William Caldwell, requested $60 an hour for his services under the 1976 Civil Rights Attorney's Fees Awards Act; Elijah Noel, Jr., in a comparable position with Mr. Dinkins, requested $50 an hour for his services to plaintiffs through 1977, $60 thereafter. *Id.*

In *Oliver v. Kalamazoo Board of Education,* 576 F.2d 714 (6th Cir. 1978), another leading school desegregation case comparable to the one at issue, lead counsel Lucas (and others in the category of Mr. Williams)[5] received fees ranging from $60 to $100 an hour for courtroom services, and this allowance, in-

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[3] As a former district judge for many years in the Western District of Tennessee and, before 1971, a practicing lawyer in the largest city in the state, my own experience indicates that Judge Wiseman was, if anything, generous in his award and rate of compensation granted to plaintiffs' attorneys.

[4] *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

[5] Including a judge on this court, then chief counsel for the NAACP Legal & Defense Fund, and a federal district judge in Michigan.

stead of "bonus awards," was approved by this court. Other attorneys in the case for plaintiffs were awarded fees ranging from $35 to $60. *Oliver,* 576 F.2d at 717 n.3. Mr. Williams was awarded total fees of $47,833 by this court arising from his services to plaintiffs as lead counsel over approximately fifteen years in another school case with a similar appellate history, including Supreme Court hearings. *Monroe v. Board of Commissioners of the City of Jackson, Tennessee,* 581 F.2d 581 (6th Cir. 1978). *See also Monroe v. Board of Commissioners of Education of Madison County, Tennessee,* 583 F.2d 263 (6th Cir. 1976). The rates ultimately approved in those cases were less than those approved by Judge Wiseman after the full hearing conducted by him before making his decision.

I therefore depart from the majority view that an increase in hourly rates or daily rates over and above that established in the reasonable discretion of the trial judge, who is familiar with local practice and local fee rates, was mandated. The majority seems unmindful of the Supreme Court's advice:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Hensley, 461 U.S. at 437.

With the contingency factor added in this case, for service beginning in 1972, plaintiffs attorneys are also being rewarded on a substantially higher basis than were plaintiffs' attorneys in *Northcross* and in *Oliver.* No added contingency factor at all was allowed in *Hensley.*

The concurring opinion of Justice Brennan in *Hensley,* 461 U.S. at 455, admonishes:

> If a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide *clearly inadequate* compensation [emphasis added].

Finally, I would affirm the trial judge in his holding that the May 30, 1972 order in this case was a type of "final order settling the issue of attorney's fees to that point." *Northcross,* 611 F.2d at 635. That order, as found by the district court, disposed of all outstanding phases of the case; it was a "discrete step" deciding the then pending issues arising from the change in the law brought about by *Breen v. School Board of New Kent County,* 391 U.S. 430 (1968). As in all substantial school desegregation cases of this type, including the *Northcross* case, the court retained jurisdiction for such implementation that experience and future changing circumstances might bring about. This did not prevent the 1972 order, affirmed by this court, from being the kind of "discrete step or distinct break in the proceedings" described in *Northcross.* It was a comprehensive order directing desegregation of the metropolitan school system from which both sides unsuccessfully appealed up to the United States Supreme Court. There were no further substantial hearings in this case until 1978, further evidencing that the district court was not clearly erroneous in making a factual finding to that effect and limiting the fee award in light of that finding. It is abundantly clear that major school desegregation cases of this kind may extend over many years, but that interim final orders may come about reflecting a distinct conclusion of then pending issues, which in light of the changes in applicable law, (such as *Green, supra,* and *Swann v. Charlotte-Mecklenburg Board,* 402 U.S. 1 (1972)) may be revised to reflect current standards or new, unforeseen conditions.

In sum, I dissent because I believe Judge Wiseman acted fairly and within the bounds of his sound discretion and applied the law reasonably to the facts of the case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 83-5175, 5243

Robert W. Kelley, et al.,
Plaintiffs-Appellants, Cross-Appellees,

vs.

Metropolitan County Board of Education, et al.
Defendants-Appellees, Cross-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee.

Decided and Filed February 12, 1985

Before Edwards* and Krupansky, Circuit Judges; and Celebrezze, Senior Circuit Judge.

Krupansky, Circuit Judge. Plaintiffs Robert W. Kelley and the class he represents appealed and defendant Metropolitan County Board of Education (Board) cross-appealed the district court's award of attorney's fees in this school desegregation case.

Commencing on the heels of the landmark case of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the instant case has spawned volumes of court opinions and orders at both the district and appellate levels. These decisions need not be recounted in detail here. *See, e.g., Kelley v. Metropolitan County Board of Education,* 687 F.2d 814 (1982); *Kelley v. Metropolitan County Board of Education,* 463 F.2d

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* The Hon. George Edwards took senior status January 15, 1985.

732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972); *Kelley v. Metropolitan County Board of Education,* 511 F.Supp. 1363 (M.D. Tenn. 1981). Suffice to say that the litigation undoubtedly required hundreds of hours of work by the plaintiffs' and Board's attorneys.

The plaintiffs' initial motion for attorney's fees, pursuant to the Educational Amendments of 1972, 20 U.S.C. § 1617, was filed on February 8, 1974. Subsequent filings amended the pending motion to include a prayer for relief under the 1976 Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. In December, 1982, the trial court conducted hearings on the issue of attorney's fees. On February 23, 1983, the court awarded plaintiffs' fees and costs of approximately $139,500 or less than ten percent of the amount requested.[1] The discrepancy between the amount requested and that awarded formed the basis of plaintiff's appeal.

Specifically, plaintiffs alleged error in the district court's refusal to award attorney's fees for services rendered prior to 1972, for declining to award fees for appellate services, and for abusing its discretion in calculating the daily and hourly rates of

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[1] In its motion for attorneys fees, plaintiff requested the following amounts for services rendered in the 28-year history of the case:

(1) Avon Williams for the firm of Looby and Williams, 917.8 hours at $200 per hour and 36.4 days at $1,500 a day, totaling $238,160 plus a 100 percent contingency factor for a total of $476,320;

(2) Avon Williams, individually, 1,211.5 hours at $200 per hour and 87.3 days at $1,500 per day, totaling $373,250 plus a 100 percent contingency factor for a total of $746,500;

(3) Richard Dinkins, individually, 215.6 hours at $120 per hour and 38 days at $1,500 a day, totaling $82,872, plus a 100 percent contingency factor for a total of $165,744.

An additional $126,000 was requested for work performed by Legal Defense Fund attorneys, but the denial of this request was not challenged on appeal.

plaintiffs' attorneys Avon Williams and Richard Dinkins. The defendant Board's cross-appeal challenged the district court's failure to discern the specific extent to which plaintiffs prevailed on each of their claims, and in holding the Board liable for services required by plaintiffs' attorneys due to the intervention of third parties.

The district court's denial of attorney's fees for services performed prior to 1972 was predicated on the court's determination that a 1971 desegregation order, entered by the district court and approved by the Sixth Circuit, was a "final order" which terminated entitlement to attorney's fees under this court's mandate in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

In *Northcross, supra,* this court cautioned that although attorney's fees could be awarded retroactively for all desegregation cases pending at the date of § 1988's enactment, such retroactive relief was not automatic. The court stated:

> This is not to say that a retroactive award of attorney's fees must be made in all school desegregation cases. Certain interim aspects of the case may have been subject to a final order settling the issue of attorney's fees to that point, rendering the reopening of long-settled aspects of the case unfair.

611 F.2d at 635.

Based on the above guidance, the *Northcross* district court held on remand that a 1966 consent order entered in the Memphis school desegregation case constituted a final order, thus barring an award of attorney's fees for work completed prior to 1966.

In the instant case, the court below concluded that the 1971 order of the district court, affirmed in *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir.), *cert.*

denied, 409 U.S. 1001 (1972), constituted a "final order" as did the 1966 consent decree at issue in *Northcross.* This court, however, is not persuaded by that conclusion.

The critical distinction between *Northcross* and the instant case is the nature of the orders at issue. In *Northcross,* the 1966 order was the result of a consent decree, drafted by the parties and approved by the district court. No further litigation was contemplated by the parties at that time, and in fact neither party sought additional relief until the Supreme Court rendered its historic decision in *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689 (1968), which clarified plaintiffs' entitlement to a more drastic desegregation plan than that provided in the 1966 consent decree.

In contrast, the 1971 order at issue herein was not a result of an agreement drafted by the parties; to the contrary, the court expressly rejected the desegregation proposals submitted by the Board and the plaintiffs in favor of a plan presented by the Department of Health, Education and Welfare (HEW), an intervenor in the suit. Both the Board and the plaintiffs appealed the adoption of the HEW scheme. And in upholding the lower court's sanctioning of the HEW plan, this circuit observed:

> The order of the District Judge is the first comprehensive and *potentially effective desegregation order* ever entered in this [17 years of] litigation. The District Judge tells us that now *the remedy is at least in sight.*

463 F.2d at 734. Thus, it is clear that neither the parties nor the appellate court viewed the 1971 order as signaling the termination of the litigation. The plaintiffs have continuously sought modification of the 1971 plan and subsequent revisions by the court due to their convictions that the implemented schemes have had a disparate impact on black children. As recently as 1982, this circuit again remanded the case, concluding that "[i]n large measure, the pupil assignment components of this plan do not withstand constitutional scrutiny." *Kelley, supra,* 687 F.2d at 824.

In view of the foregoing, the 1971 district court's adoption of the HEW plan, and this court's subsequent affirmance in 1972, did not represent a distinct break in the litigation. Therefore, an award of fees for legal services performed and accrued prior to 1972 is appropriate.

Plaintiffs have also challenged the trial court's refusal to award attorney's fees for services rendered by their attorneys at the appellate level. Compensation was sought, *inter alia,* for appellate work which culminated in this court's 1972 and 1982 *Kelley* opinions. *See,* 463 F.2d 732; 687 F.2d 814.

The court below predicated its denial of compensation for the services performed by the attorneys in the appellate litigation on *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982). In *Buian,* the court announced that the award of costs to a litigant pursuant to the Federal Rules of Appellate Procedure was an absolute prerequisite to the award of attorney's fees under § 1988 for services performed at that level. As costs were not awarded by this court to plaintiffs in conjunction with their previous appeals, the district court, applying *Buian,* barred compensation for their attorneys' services. However, this court is of the opinion that the district court erred in retroactively applying *Buian* to the case at bar.

To determine whether a particular decision should be given retroactive effect, the test articulated in *Chevron Oil v. Huson,* 404 U.S. 97, 106-107 (1971), must be applied. Under *Chevron,* a new decision should be applied to pending cases "unless it represents a 'clear break' with the past and unless in addition it would be fundamentally unfair or otherwise burdensome to apply it." *Casiano, Jr. v. Heckler,* No. 83-3481 (6th Cir. Oct. 22, 1984) (*quoting, Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100,* 698 F.2d 250, 254 (6th Cir.), *cert. denied,* 104 S.Ct. 69 (1983)). Applying this criteria, it is clear that *Buian* should not be retroactively applied to deny compen-

sation for appellate work performed prior to 1982 by plaintiffs' attorneys.[2]

Regarding the initial criterion of the *Chevron* test, it is obvious that *Buian* represented a "clear break" from past law. Prior to *Buian,* a civil rights litigant simply had to "prevail" on appeal to qualify for attorney's fees for services rendered at the appellate level. *Buian,* however, placed an additional burden on a litigant, i.e., seeking and securing an award of costs from the appellate court pursuant to Fed.R.App.P. 39, as an absolute prerequisite to receiving attorney's fees under § 1988.[3]

As for the other criteria of *Chevron,* this court concludes that it would be fundamentally inequitable to deny plaintiffs' attorneys compensation for appellate work performed prior to the pronouncements of *Buian* in 1982 because plaintiffs failed to secure an award of costs, which was a non-existent prerequisite prior to 1982. A contrary disposition would completely undermine the purpose of § 1988, which was designed to compensate attorneys whose efforts resulted in the vindication of important constitutional rights. *Northcross, supra.* In sum, *Buian* is not applicable to the case at bar for pre-1982 appeals and the trial

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[2] This court takes judicial notice that while at least one *Kelley* appellate decision was rendered the same year as *Buian, see* 687 F.2d at 814, that appeal was argued on December 11, 1981. Thus, the appellate work for which plaintiffs seek compensation was undoubtedly substantially completed well before *Buian* was issued in September, 1982.

[3] The *Buian* court itself recognized the burden which its decision placed on the court as well as on a litigant. The court observd:

> A special responsibility is placed upon the court of appeals in awarding costs in civil rights cases that does not exist in other cases because of the fact that fees for attorney's services on appeal will be denied where costs are not awarded.

687 F.2d at 862, n.5.

court erred in failing to award attorney's fees for work related to those appeals.

In addition to challenging the lower court's exclusion of time accrued for pre-1972 and appellate work, plaintiffs urge that the hourly and daily rates awarded by the lower court for legal services rendered by Avon Williams and Richard Dinkins were inadequate. Compensation at the rate of $200 per hour and $1,500 per day in court was requested for Williams, and $120 hourly and $1,500 per day sought for Dinkins' services. Subsequent to evaluating the prevailing rate charged by experienced and skillful lawyers in the Nashville area, the court below determined that the market rate in federal court litigation for an attorney of Williams' experience, ability and stature was $100 per hour and $1,000 per day of trial. The rate for Dinkins, who was introduced into the case upon gaining admission to the bar, was $60 per hour and $600 per day in court. The court also rejected plaintiffs' prayer for a 100 percent contingency to compensate for the difficulty of the prolonged litigation and its unpopularity in some sectors of the community. The court then reduced the amount 10 percent to account for duplication of services and possible miscalculations in the attorneys' reconstruction of their time records.

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), the Fifth Circuit listed 12 factors to be considered in determining an appropriate award of attorney's fees. These factors include, *inter alia,* the time and labor required, novelty and difficulty of the litigation, the customary fee, and the experience, reputation and ability of the attorneys. In *Northcross, supra,* this court observed that *Johnson* did not provide guidance as to the relative weight to be accorded each factor, and suggested that "an analytical approach" be applied. *Northcross* instructs:

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all of the relevant factors and will lead to a

> reasonable result. The number of hours of work automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and the "experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case.

611 F.2d at 642-43.

Fairly read, *Northcross* advises that the attorney's normal hourly billing rate should be a key focal point in award determinations. In the recent case of *Blum v. Stenson*, ____ U.S. ____, 104 S.Ct. 1541 (1984), the Supreme Court further instructed that "reasonable rates" are to be determined under § 1988 "according to the prevailing market rates in the relevant community." 104 S.Ct. at 1547.

In contesting the $100 per hour award to Williams, plaintiffs cited testimony adduced at the hearing on the motion for fees evincing (1) Williams' reputation as an experienced and successful civil rights lawyer; (2) that "customary fees" for similar work in the Nashville area ranged from $100 to $200 an hour; (3) that Williams' hourly fee for office work was $120; and (4) that the unpopularity of the case has resulted in threats against Williams. Testimony that the standard fee for someone of Dinkins' stature was $65 to $130 an hour was also cited to support plaintiffs' contention that Dinkins' award was inadequate. In addition, plaintiffs recounted the unpopularity and length of the litigation in arguing that the contingency fee should be higher than the 25 percent awarded by the court below.

Considering in tandem the pronouncements of the Supreme Court and Sixth Circuit delineating the correct method for calculating attorney's fees, this court concludes that Williams

is entitled to at least a minimum rate of $120 per hour. This amount is a reasonable point of departure in calculating Williams' hourly rate in accordance with prevailing Supreme Court and this circuit's directions and is within the parameters of the evidence that "customary fees" for similar work in the Nashville area ranged between $100 and $200 an hour. The award to Dinkins must also be reconsidered using as a minimum point of departure an amount of $65 per hour as the prevailing value of his skills in the Nashville legal community. The daily (in court) rate for Williams and Dinkins should also be upgraded to at least $1,200 and $650 respectively.

The lower court's overall reduction of fees by 10 percent for duplication of services is justified under the holdings of *Weisenberger v. Huecker,* 593 F.2d 49, 54 (6th Cir. 1979) and *Oliver v. Kalamazoo Board of Education,* 576 F.2d 714, 715 n.2 (6th Cir. 1976) (per curiam). In addition, the Supreme Court recently approved a 30 percent overall reduction in a case, like the one at bar, where the attorneys failed to keep contemporaneous time records and thus had to reconstruct them from memory *See Hensley v. Eckerhart,* ____ U.S. ____, 103 S.Ct. 1933, 1939 (1983). However, the reduction in *Hensley* was also designed to compensate for the attorney's inexperience. Thus, the 20 percent reduction in the instant case is reasonable and should not be disturbed.

Plaintiffs also challenged the district court's refusal to award fees for the two days and seven hours plaintiffs' attorneys attributed to discussions with Dr. Scott, the plaintiffs' witness at the 1979 and 1980 hearings. The court's opinion was based on its finding that Dr. Scott's testimony was frivolous under *Northcross, supra,* 611 F.2d at 636, in light of plaintiffs' repudiation of much of Dr. Scott's testimony after the court had admitted it. The district court's conclusion in this respect is proper.

In its cross-appeal, the defendants alleged that the trial court erred in failing to exclude fees for services rendered by plain-

tiffs' attorneys arising from claims and proceedings stemming from the intervention or joining of other parties. These "outside" parties were:

1. The Metropolitan (Nashville/Davidson Co.) Mayor and Council, which plaintiffs joined as defendants in 1972. (Plaintiffs prevailed in their effort to enjoin these defendants from interfering with the desegregation plan.)

2. The intervention by the Board itself as a third party plaintiff in 1973 to present its claim against third-party defendant HEW.

3. A group of otherwise unidentified "intervenors" who proposed a desegregation plan to the district court in 1979.

4. Another unidentified group of intervenors who entered the case to propose the creation of a magnet school.

The defendant Board further noted that it vehemently opposed the intervention of the third and fourth group of intervenors listed above.

Plaintiffs responded to the Board's argument on this issue by observing that it was the Board's failure to dismantle its dual school system that occasioned the intervention and prolonged the litigation in this lawsuit.

Defendants relied primarily on *Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979) (per curiam) for the proposition that plaintiffs should look to the intervenors, rather than the defendant, for expenses occurred as a result of the intervention. However, *Haycraft* is distinguishable from the instant case in several important respects.

In *Haycraft*, L. J. Hollenbach, a county judge of Jefferson County, Kentucky, intervened on behalf of "all the people of

Jefferson County" in a desegregation case pending in federal court. The judge proposed an alternative desegregation plan which protracted the litigation and resulted in several appeals. Following the appeals, the original plaintiffs sought an award of attorney's fees to be assessed against the intervenor pursuant to the Emergency School Aid Act of 1972, 20 U.S.C. § 1617. In granting the order, the district court held the $11,312 award against the intervenor appropriate, as plaintiffs would have saved countless hours were it not for the intervenor. On appeal, this circuit affirmed the award, holding that the plaintiffs became the "prevailing party" as regarded Hollenbach "when the district court rejected his desegregation plan and dismissed him as an intervenor." 606 F.2d at 132.

Thus, the award assessed against the intervenor in *Haycraft* was predicated on the court's finding that the intervenor obstructed rather than aided in the development of the court-ordered desegregation scheme. The award was also sought by the plaintiffs directly from the intervenor. In the instant case there is no evidence that the intervenors in any way interfered with the progress of the litigation, and thus plaintiffs would not, under the *Haycraft* analysis, be entitled to remuneration from the intervenors. The question remains, of course, whether the plaintiff is entitled to attorney's fees *from the Board* for the extra time which the plaintiffs' counsel devoted to issues raised by the intervenors.

There appears to be no case law which directly resolves this issue. Common sense dictates that the Board should not be held liable for the costs plaintiffs incurred in seeking an injunction against the Metropolitan Mayor and Council, as that group was itself a third-party defendant, unrelated to the Board. Thus, if any party is liable for those expenses, it would be the Metropolitan government and not the Board. As to the other intervenors, however, (i.e. the Board itself as a third-party plaintiff, the group which proposed a desegregation plan in 1979, and the advocates of the magnet school) plaintiffs' argu-

ment that the Board's failure to dismantle its dual school system caused the intervention is persuasive. Thus, plaintiffs are entitled to compensation from the Board for all legal services except those resulting from plaintiffs' addition of the Metropolitan Mayor and Council as third-party defendants.

Defendant's final argument on cross appeal was that the court erred in not determining the specific extent to which plaintiffs had prevailed in the action. The defendant contended that while the court's focus on the "overall results" of the case was sufficient to satisfy the "prevailing party" requirement as defined by this circuit in *Northcross, supra,* a recent Supreme Court decision has changed the standard. Defendant cites *Hensley v. Eckerhart,* ____ U.S. ____, 103 S.Ct. 1933 (1983) for the proposition that the *Northcross* approach has been modified, and that awards under § 1988 now require that a party's request for attorney's fees be carefully scrutinized as to the extent of success on each claim, and further, that time spent on unsuccessful claims that are distinct from successful claims should be excluded in determining a reasonable fee.[4] Thus, defendant suggested that under the mandate of *Hensley,* the case should be remanded with instructions to examine the extent to which plaintiffs have prevailed on each substantive issue before awarding fees. The court agrees.

In *Hensley,* plaintiffs brought a lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Missouri. The complaint challenged the treatment and conditions at the Forensic Unit as presenting a wide variety of alleged constitutional infringements. The court found constitutional violations in five of six general areas cited in plaintiffs' complaint: physical environment; individual treat-

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[4] Specifically, defendant alleged that plaintiffs have been erroneously awarded fees for time spent pursuing unsuccessful charges of contempt against the Board, yet unresolved matters as to faculty composition, and their effort to keep Pearl High School open.

ment plans; least restrictive environment; visitation, telephone and mail privileges; and seclusion and restraint. However, it found the sixth general area, staffing, to be sufficient. 103 S.Ct. at 1936.

In ruling on an attorney's fees motion, the *Hensley* district court first determined that plaintiffs were prevailing parties even though they had not succeeded on all six claims, and further refused to eliminate from the award hours spent on the unsuccessful claim. The Supreme Court reversed and remanded, reasoning that two questions must be addressed when a motion for attorney's fees is presented in a case involving numerous claims: (1) did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?; and (2) did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? 103 S.Ct. at 1940.

However, *Hensley,* does not, as defendant suggested, represent a *total* break from the approach taken regarding the "prevailing party" issue by this circuit in *Northcross.* Rather, the *Hensley* court noted that in some cases, the litigation cannot be "viewed as a series of discrete claims." *Id.* In such a case, the Court states, the *overall result* will still be the primary factor in determining attorneys fees.

The *Hensley* court instructs:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

103 S.Ct. at 1940.

On remand, the district court must follow the mandates of *Hensley* as explicated above.

In sum, this court finds the amounts awarded by the lower court inadequate.[5] This case is therefore remanded to the district court with instructions to award fees for services performed by plaintiffs' attorneys prior to 1972; award fees for appellate work; reevaluate the hourly rate to be awarded to Williams and Dinkins in accordance with the direction of this decision; reevaluate the court time for Williams and Dinkins with a minimum departure point of $1,200 and $650 respectively; decrease the award for the time spent by plaintiffs' attorneys to bring in the city government as a third party defendant; follow the mandate of *Hensley, supra,* to determine which claims plaintiffs have succeeded upon and those which they have not, and to calculate the attorneys' compensable hours accordingly; allow a 25% increase as a contingency factor; and decrease the overall award by 10% for duplication of services and the reconstruction of time records from memory.

In view of the foregoing this case is Reversed and Remanded. Costs awarded to plaintiffs.

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[5] This court also notes that the *entire* amount awarded to plaintiffs' attorneys for 28 years of service in this case was less than one-half of the $288,000 which the Board paid its attorneys to defend against the litigation in just one five-year period, i.e. 1978-1982.

APPENDIX C

Robert W. Kelley, et al.,
Plaintiffs,

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.,
Defendants.

Nos. 2094, 2956

United States District Court,
M.D. Tennessee,
Nashville Division.

Feb. 23, 1983.

MEMORANDUM

WISEMAN, District Judge.

I. *Background*

This lawsuit to compel desegregation of the Nashville school system was originally filed in 1955. The long history of this litigation is summarized in *Kelley v. Metropolitan City Board of Education,* 492 F.Supp. 167, 168-78 (M.D. Tenn.1980), and need not be repeated here. The current phase of the litigation involves four distinct topics: (1) pupil assignment; (2) teacher and staff assignment; (3) plaintiffs' request for attorney's fees; and (4) plaintiffs' petition for contempt against defendant school board. The pupil assignment plan took precedence, by agreement of the parties, leaving the three other issues to be resolved at a later date. This Court held hearings on the remaining three issues on December 6, 7, and 8, 1982, at which time the parties reached a consent agreement on the question of teacher and staff assignments.

Plaintiffs now seek an award of attorney's fees pursuant to 42 U.S.C. § 1988. Since 1955, Mr. Avon N. Williams, Jr., has represented the plaintiffs in this action. In the early years of this lawsuit, Williams teamed with his former law partner, Mr. Z. Alexander Looby. Since 1977, Williams has been joined by his associate, Mr. Richard H. Dinkins, in this matter. No attorney's fees have ever been awarded in the history of this litigation.

II. *Preliminary matters*

A. *Applicability of the Civil Rights Attorney's Fees Act*

Defendant school board has not contested plaintiffs' claim that the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, applies to this litigation. The Act declares that, in suits brought under 42 U.S.C. § 1983 and certain other statutes, federal courts may award prevailing parties reasonable attorney's fees as part of the costs. The Act applies to all cases pending on the date of its enactment. *Hutto v. Finney,* 437 U.S. 678, 695 n. 23, 98 S.Ct. 2565, 2575, n. 23, 57 L.Ed.2d 522, 537 (1978). The Sixth Circuit has held that the word "pending"

> . . . means that all the issues in the case have not been finally resolved. So long as there was an active controversy in the case at the time the Act became effective, the Act applies to authorize fees for the entire case, unless special circumstances exist which would make an award manifestly unjust.

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 634 (6th Cir.1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).[1]

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[1] *Northcross* also held that the determination of whether fees were to be awarded for the entire case may depend on the existence of a "final order" at any time in the litigation. This specific topic is addressed *infra.*

In *Weisenberger v. Huecker,* 593 F.2d 49 (6th Cir.1979), the merits of the case were resolved well before passage of the Act, but the application for attorney's fees had not been resolved when the Act became effective. The Sixth Circuit held that "[s]ince the Act was in existence at the time the district court made the fee awards, it is applicable to the instant cases." *Id.* at 53.

In this case, plaintiffs requested fees in motions dated February 8, 1974, April 11, 1975, and October 16, 1975. Those motions, and other important motions including substantive issues, were pending when the Act took effect in 1976. Thus, *Weisenberger* and *Northcross* govern, and, as a threshold question, the Act applies

B. *Prevailing party*

As a preliminary matter, plaintiffs must first be found to be the prevailing party before attorney's fees can be awarded under 42 U.S.C. § 1988. Defendants claim that plaintiffs are not the prevailing party because (1) the Board stipulated *ab initio* that its schools were unconstitutionally segregated, and (2) the plaintiffs have never submitted a desegregation plan which has been implemented by the Court.

Defendants' position appears to be an overly narrow approach to the definition of prevailing party. The Sixth Circuit has stated:

> In accordance with the broad remedial purpose of the statute, parties may be considered to have prevailed when they have vindicated important rights through a consent judgment or without formally obtaining relief.

Northcross, supra, at 633.

Adhering to the Sixth Circuit's mandate to look at this question in practical terms, it is clear that plaintiffs in this case are the prevailing party in this litigation. Plaintiffs have clearly

prevailed as to the basic holding of this Court throughout the twenty-seven year course of this case that some type of court-ordered remedy was necessary to alleviate the effects of prior *de jure* segregation.

Furthermore, it is not necessary for plaintiffs to have prevailed on every single legal position or argument asserted. To the contrary, plaintiffs are entitled to fees for "all time reasonably spent on a matter." *Northcross, supra,* at 636. In *Northcross,* the Court stated:

> The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into "issues and parts of issues as to which the plaintiffs did not prevail," especially by decimating the total hours claimed with arbitrary percentages. Suffice it to say, however, that Congress has mandated that a prevailing party's attorney should be compensated "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." We know of no "traditional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail on "issues or parts of issues." Furthermore, it would hardly further our mandate to use the "broadest and most flexible remedies available" to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position on their clients' behalf that is possible in good faith. The fact that these lawyers advocated a desegrega-

> tion remedy of broader scope and faster pace than was ultimately adopted cannot be considered to be unreasonable. Their clients have prevailed; the Memphis school system is desegregated.

Id. This approach was recently reaffirmed by the Sixth Circuit. *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982) at 862. *Northcross* also allowed fees to be awarded for time spent litigating the fees question itself. *Northcross, supra,* at 643.

Thus, plaintiffs have prevailed and are entitled to fees for all time reasonably spent on matters involved in this case.

III. *Computation of Hours and Fees*

A. *Plaintiffs' Request*

Messrs. Williams and Dinkins have filed affidavits wherein they reconstruct their time spent on this lawsuit. Although Williams and Dinkins have not kept contemporaneously maintained records, they claim that the reconstruction adequately represents the services which they have performed. Plaintiffs request fees in the following amounts:

(1) Avon Williams, for the firm of Looby and Williams, 917.8 hours at $200 per hour and 36.4 days at $1,500 a day, totaling $238,160 plus a 100 percent contingency factor for a total of $476,320;

(2) Avon Williams, individually, 1,211.5 hours at $200 per hour and 87.3 days at $1,500 a day, totaling $373,250 plus a 100 percent contingency factor for a total of $746,500;

(3) Richard Dinkins, individually, 215.6 hours at $120 per hour and 38 days at $1,500 a day, totaling $82,872, plus a 100 percent contingency factor for a total of $165,744;

(4) Norman J. Chachkin, for the Legal Defense Fund, 43 hours at $200 per hour, totaling $8,600, plus a 100 percent contingency factor for a total of $17,200;

(5) Bill Lann Lee, for the Legal Defense Fund, 270.4 hours at $115 per hour, totaling $31,096, plus a 100 percent contingency factor for a total of $62,192;

(6) Legal Defense Fund, costs and expenses totaling $47,488.15.

In awarding fees, a district court is not compelled to accept automatically all the hours claimed, but any reductions must be clearly identified and the reason for dis-allowing claims must be articulated. *Northcross, supra,* at 636-37. This Court will attempt to do just that.

B. *The "Final Order" Question*

At the outset of the hearings held in December 1982, this Court made two rulings from the bench in order to limit the proof at those proceedings. First, this Court held that no fees could be awarded for services rendered prior to May 30, 1972, on which date the Sixth Circuit affirmed the desegregation plan entered by this Court in 1971. Second, this Court ruled that it lacked the authority to award fees for appellate work in this case. That ruling is addressed *infra.*

Turning to the "final order" question, one of the many issues addressed in *Northcross,* the Sixth Circuit there ruled that a prior final order in that school desegregation case could bar an award of fees for services rendered prior to that date. 611 F.2d at 635. After ruling that plaintiffs' attorneys should recover fees which the district court had denied in part, the Sixth Circuit stated:

> This is not to say that a retroactive award of attorney's fees must be made in all school desegregation cases. *Certain interim aspects of the cae may have been subject to a final order settling the issue of attorney's fees to that point, rendering the reopening of long-settled aspects of the case unfair.*

Northcross, supra, at 635. (emphasis added). The Court held that the fee awarded should cover at least back to 1968 when the suit became active again following new pronouncements from the United States Supreme Court which directly affected the Memphis case. The Court said, however:

> There is an unresolved dispute concerning the pre-1968 period, which we leave to the district court to resolve. The School Board contended below that the district court action of July 29, 1966, the last action before the Supreme Court's *Green [v. County School Bd.,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716] decision, was a "consent order" which undertook to dispose of all outstanding phases of the case, including fees and costs. It is true that a long, complicated case of this sort can result in several "final" orders, which in the interests of finality are deemed to dispose of all foregoing issues. Absent a timely appeal, a party is bound by the order and any later challenge is deemed to be a collateral attack judged by different, and more stringent standards than on direct review. *Bradley [v. School Bd. of Richmond*], *supra,* 416 U.S. [696] at 710-11, 94 S.Ct. 2006 [at 2015-16, 40 L.Ed.2d 476]. If the defendants are correct in their characterization of the 1966 action in the interest of finality, plaintiffs should not be permitted to reopen that judgment in order to obtain attorneys' fees. We leave this matter to the district court. However, from 1968 until shortly before the application for fees was made by the plaintiffs, the case was in continuous, active litigation. Not only was there no "final judgment" which could reaonably be said to settle the issue of fees during that period, but there was no time to raise the matter of fees at all.

Id.

On remand, the district court denied plaintiffs' request for fees for services rendered prior to 1968. *Northcross v. Board of*

Education of Memphis City Schools, Civil Action No. 3931, January 14, 1982 (W.D. Tenn.). Judge McRae gave the following explanation:

> The Court finds that the services expended on the portion of the case occurring prior to the filing on 26 July 1968 of plaintiff's motion for further relief should be denied. A plan of desegregation in this cause conforming to what was thought to be the then existing legal standards, was developed and filed jointly by the parties on 22 July 1966. That plan was intended and treated by the parties as a final plan of desegregation, and a distinct break in the proceedings in this case occurred at that time. Previous to that time there had been two appeals taken successfully by the plaintiffs. The 1968 motion for further relief did not grow out of any evident intention of these parties to litigate that plan further, but was the direct result of subsequent Supreme Court decisions in the case of *Green v. County School Board of New Kent County, Virginia,* 391 U.S. 430 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968), and its companion cases which represented very significant new development in the law pertaining to school desegregation. This case at bar is similar to the case of *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir.1978), wherein the Court held that plaintiffs might timely file for a fee resulting from the continuous hearings and appeals on their motion for further relief, but denied a fee for earlier "discrete steps" in the litigation.

Id. at 6, 7.

The immediate question, then, is whether the May 30, 1972, order was the type of "final order," disposing of all issues at that time, contemplated by *Northcross.* This Court holds that the order of the Sixth Circuit on May 30, 1972, upholding the 1971 plan adopted by Judge Morton, was such a final order.

Plaintiffs have argued that the 1972 order was not a *Northcross* style "final order" because:

(1) the 1971 plan was appealed by both parties;

(2) the district court specifically retained jurisdiction;

(3) the plan ws affirmed with the Sixth Circuit observing that matters regarding implementation could "be brought to the District Judge's attention when the case is back before him." *Kelley v. Metropolitan Cty. Bd. of Education,* 463 F.2d 732 at 746;

(4) there were further proceedings in 1971-72 in which the Board was allegedly adjudged to have engaged in bad faith implementation;

(5) plaintiffs continued to seek more effective desegregation and relief for the transportation burden placed on younger black students (Reply of Plaintiffs to Petition of Defendants filed on July 18, 1972, filed August 10, 1972), but those requests were not heard by the Court until 1978; and

(6) defendants sought modifications of the 1971 plan and those requests were also not heard until 1978.

Defendants rely heavily on Judge McRae's opinion in *Northcross* after the Sixth Circuit remanded the case to him to determine whether the 1966 plan in that case was a "final order." The Board stated that the 1972 order in *Kelley,* like the 1966 order in *Northcross,* disposed of all outstanding phases of the case, including fees and costs. Citing language from *Northcross,* the Board calls the 1972 order a "discrete step" which constitutes a final order and precludes a retroactive award of attorney's fees. Furthermore, the Board claims that the precipitating factor for the 1972 order was *Green v. School Board of New Kent County,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), just as it was in *Northcross.*

The Court is not persuaded that the 1972 order cannot be considered "final" due to the fact that unlike the *Northcross* case, there was no consent order agreed upon by the parties

here. An order entered by any court is no less "final" simply because one or more of the parties may have lingering doubts about the conclusion reached by the court. Nor is this Court's immediate decision altered by the fact that this court in 1971 expressly retained jurisdiction in the case. Where equitable relief is sought, a court will often retain jurisdiction to oversee the remedy and monitor its efficacy.

Plaintiffs' claim that no final order was entered because the Sixth Circuit stated that matters involving implementation could be brought to the District Court's attention also fails to support plaintiffs' position. By focusing on the *implementation* of the plan, plaintiffs at the time necessarily acknowledged that the plan adopted was a comprehensive one which addressed all outstanding issues, leaving only matters of implementation to be addressed.

Finally, plaintiffs argue that the 1972 order left open the question of whether the plan adopted by the District Court in 1971 placed a disproportionate burden on young black children. This claim is erroneous. Plaintiffs took that argument to the Sixth Circuit and that Court refused to overturn the District Court's plan in that regard. The Court stated:

> Plaintiffs-Cross-appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.
>
> The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6. In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann*. *Swann v. Board of Education, supra,* 402 U.S. [1] at 10, 91 S.Ct. 1267 [at 1273], 28 L.Ed.2d 554. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can ap-

> propriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

463 F.2d at 746. Although the Court stated that the District Court could, at a later date, evaluate any adverse effects of the plan, plaintiffs' specific claim was heard and rejected on May 30, 1972, when the Sixth Circuit ruled that the District Court had not abused its discretion. Thus, as of May 30, 1972, there were no unresolved issues in the case.

This Court agrees with the defendants' characterization of the 1972 order as a "discrete step" which constituted a "distinct break in the proceedings" at that time. *See Northcross*, Civil Action No. 3931, January 14, 1982 (W.D.Tenn.). At the time of the 1972 order, the Sixth Circuit clearly viewed the 1971 plan as a "discrete step," saying:

> The order of the District Judge is the first comprehensive and potentially effective desegregation order ever entered in this litigation. The District Judge tells us that now the remedy is at least in sight.

463 F.2d at 734. Consequently, this Court concludes that the 1972 order was a "final order" and that "plaintiffs should not be permitted to reopen that judgment in order to obtain attorneys' fees." *Northcross, supra*, 611 F.2d at 635.

Plaintiffs' reliance on *Monroe v. Board of Commissioners of Jackson*, 581 F.2d 581 (6th Cir.1978) does not alter this Court's conclusion. There, the Sixth Circuit ordered $42,833 in fees to be paid under section 1988 for work done since the beginning of the litigation, even though a prior order in 1972 awarded $5,000 for costs incurred up to that point. *Monroe, supra*, at 582. This Court will not follow plaintiffs' reading of *Monroe* for two reasons. First, *Monroe* was a brief, *per curiam* opinion written in 1978. Its impact is reduced significantly by *Northcross*, which was written in 1979 and is regarded across the nation as

one of the most thorough and comprehensive opinions on the award of fees under section 1988. Insofar as a plausible reading of *Monroe* conflicts with the *Northcross* guidelines, this Court will view *Northcross* as taking precedence. Second, because this Court is bound by *Northcross,* the "final order" factor is important. In this regard, *Monroe* can be distinguished from the instant case because the 1972 order of the Sixth Circuit in *Monroe* which approved the $5,000 fee award was clearly not a "final order," whereas the instant case did have a "final order" entered (coincidentally, in 1972).[2]

Thus, plaintiffs are only entitled to fees incurred after May 30, 1972. Therefore, plaintiffs' request of fees will be reduced by 917.8 hours and 36.4 days for the work performed by Williams in the law firm of Looby and Williams, and 550.7 hours and 44 days for work performed solo by Williams between 1969 and May 30, 1972. The total amount disallowed here comes to 1,468.5 hours and 80.4 days.

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[2] Plaintiffs also cite *Monroe* to contest the Board's claim that the Sixth Circuit's failure to award plaintiffs' request for fees in 1972 is *res judicata* for purposes of this question. Because this Court's conclusion is based on the "final order" language of *Northcross,* it is not necessary to address the Board's *res judicata* analysis. The Court believes, however, that it would be inappropriate to give *res judicata* or collateral estoppel effect to the 1972 denial of fees. There, plaintiffs sought fees only for double costs incurred due to the Board's appeal of the 1971 plan, an appeal which plaintiffs described as "frivolous" for purposes of their fees request under Rule 38 of the Federal Rules of Appellate Procedure. Rule 38 allows the court to award double costs to the prevailing party when frivolous appeals are taken. In the instant request, plaintiffs seek to recover fees for the entire costs of the litigation, not just for costs incurred while prevailing on a frivolous appeal. Consequently, this Court would not be inclined to give the Sixth Circuit's *sub silentio* denial of fees under Rule 38 *res judicata* effect in this action.

C. *Fees for Appellate Work*

Plaintiffs have included in their request for fees amounts representing work performed at the appellate level. At the hearings on the fee issue, this Court ruled that it would not entertain requests for fees for appellate work, relying on *Buian v. Baughard,* 687 F.2d 859 (6th Cir.1982). There, the Sixth Circuit held that

> . . . a party must be entitled to receive costs on appeal as a result of the appellate court's award of costs before it is eligible to receive attorney's fees as a part of those costs under section 1988.

Id., at 861.

Plaintiffs have encouraged this Court to adopt a narrow reading of *Buian,* but, due to the lack of any limiting language in the opinion itself, this Court cannot adhere to plaintiffs' itnerpretation. In fact, the *Buian* opinion contains clear and broad statements which this Court will follow unless subsequently ordered otherwise. The Sixth Circuit in *Buian* stated:

> It is the duty of *this Court* to determine who is entitled to costs on appeal. In this case, in which no costs were taxed on the appeal on the merits, it would also violate this Court's mandate for the District Court to award attorney's fees as part of the costs under section 1988 because the party prevailed on the case as a whole but was not awarded costs on appeal.

Id. at 862. (emphasis added).

Buian went on to say:

> In summary, we read section 1988 as requiring that attorney's fees be awarded to the party who has prevailed on the case as a whole only if costs are awarded to that party at the level for which fees for services are sought: the

> district court, the court of appeals, and the Supreme Court.

Id.

This distinction between the district courts, the court of appeals, and the Supreme Court is jurisdictional in nature, according to *Buian:*

> Cost determinations are made at three levels: the district court, the court of appeals, and the Supreme Court. Each court has jurisdiction to make *de novo* awards of costs only for proceedings within its jurisdiction.

Id. at 861.

Thus, because section 1988 permits an award of attorney's fees "as a part of the costs," *Hutto v. Finney,* 437 U.S. 678, 679, 693-99, 98 S.Ct. 2565, 2568, 2574-78, 57 L.Ed.2d 522 (1978), this Court cannot, according to *Buian,* award fees for appellate work. Plaintiffs must petition the Court of Appeals, not the District Court, for appellate work. The Court notes that in its most recent decision, dated July 27, 1982, the Sixth Circuit ruled that each party was to bear its own costs on that appeal, which also precludes an award of fees for that appellate work. *Buian, supra,* at 861.

Consequently, plaintiffs' request will be reduced by the number of hours and days spent on appeals since May 30, 1972. This amounts to 115.8 hours and five days for Williams and 17.5 hours and two days for Dinkins. The request of Mr. Bill Lann Lee, who worked only on appeals, is denied in its entirety. As for Norman Chachkin, only 10 hours of his work was performed after May 30, 1972, and those hours were spent on an appellate brief. Thus, his request is denied in its entirety.

D. *Other Specific Objections*

Defendants have submitted several other objections to plaintiffs' fee requests which will be addressed herein.

Services Rendered by Mr. Looby

The School Board argues that because the estate of Z. Alexander Looby was closed on November 22, 1972, there is no entity or person remaining to receive compensation for services performed by Looby. Moreover, the Board states that plaintiffs did not submit a breakdown of what services Mr. Looby performed, and therefore, the hours representing work done by Mr. Looby and Mr. Williams should be reduced by one-half. The position of the School Board is well taken. However, the Court need not address this factor due to its earlier ruling that no fees can be awarded for services rendered prior to the May 30, 1972, final order, which includes the services performed jointly by Messrs. Looby and Williams.

"Collateral" Issues

Defendants also call into question time spent by plaintiffs' counsel on what defendants characterize as "collateral" issues. Specifically, defendants cite time allocated for matters involving intervening parties, amicus curiae, or third parties, and not the Board of Education.[3] Defendants argue that they are not responsible for the conduct of these parties, and time spent on those matters should be disallowed as part of plaintiffs' fee request as against the Board. Although the defendants did not exercise control over these particular facets of the litigation, the congressional intent behind the Act militates against adhering to defendant's approach. Congress has mandated that a prevailing party's attorney should be compensated by a fee-paying client, for all time reasonably expended on a matter." *Northcross,*

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[3] Defendant also challenges time spent regarding plaintiffs' request for an injunction against the Board of Education and the Tennessee Secondary School Athletic Association prohibiting the proposed suspension of Cameron High School from participating in organized sports. Proceedings on this matter were held in 1968, which means that the disputed time here has already been disallowed pursuant to the "final order" ruling as stated earlier in this opinion.

supra, at 636. A private sector attorney normally would be obligated to stay fully briefed on all aspects of his or her lawsuit, and no less should be expected of the plaintiffs' attorneys in this action. Thus, the hours spent on these matters shall be included in the award.

Fees for Time Spent with Consultants

Next, defendants question fees claimed for preparation with two consultants, Dr. Hugh Scott and HGH Associates. Defendants point out that HGH Associates proposed a desegregation plan which was never approved, either at the trial or appellate levels. However, it is not proper for this Court to dissect this lawsuit into "issues and parts of issues as to which plaintiffs did not prevail." *Northcross, supra,* at 636. The fees claimed for time spent with HGH Associates shall be allowed.

The question raised by defendants regarding Dr. Hugh Scott poses an altogether different concern. Defendants note that the hearings held by this Court in 1979 and 1980 involved lengthy testimony by Dr. Hugh Scott, plaintiffs' expert witness. Further, defendants point out that this Court's plan, as adopted in 1981, was based in a significant measure upon the testimony of Dr. Scott, only to have the plaintiffs subsequently alter their position. In essence, plaintiffs rejected the testimony of Dr. Scott in subsequent proceedings. As to this factual issue, the position taken by defendants is entirely correct. Plaintiffs selected this expert, put him on the witness stand, and knew what his testimony would be. Plaintiffs then made the decision to repudiate Dr. Scott's testimony, and that decision now acts to estop plaintiffs from seeking to recover attorney's fees against the defendant Board of Education for time spent by plaintiffs' counsel with Dr. Scott. The Sixth Circuit has held that

> [s]o long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.

Northcross, supra, at 636. Assuming that standard applies in this instance as well, plaintiffs' utilization and subsequent repudiation of Dr. Scott was frivolous, at best. Plaintiffs' request will be reduced only by the time clearly attributable to Dr. Scott. General requests regarding expert witnesses will not be eliminated since the Court cannot determine from the affidavits whether those requests pertain to Dr. Scott or other consultants. The amount deducted here amounts to two days and three hours for Mr. Williams and four hours for Mr. Dinkins.

"*Unreasonable and Excessive*" *Requests*

Defendants have sifted through the affidavits of plaintiffs' counsel and registered specific line-item objections to the amount of hours claimed for specific tasks performed. On a more general level, defendants seek an across-the-board percentage reduction for duplication of effort among defense counsel and the fact that the request for fees was based on reconstructed time records. On the latter topic, defendants argue that plaintiffs' local counsel have never kept daily time records, even though they submitted requests for fees as long ago as 1974. Defendants propose a twenty percent reduction for reconstruction, based on the figure utilized by the district court in *Heigler v. Gatter,* 463 F.Supp. 802 (E.D.Pa.1978). Further, defendants argue for a ten percent reduction due to duplication of effort among the several attorneys for the plaintiffs, citing *Weisenberger v. Huecker,* 593 F.2d 49, 54 (6th Cir.1979); *Oliver v. Kalamazoo Board of Education,* 576 F.2d 714, 715 n. 2 (6th Cir.1976).

Rather than pick out specific hours which appear to be duplicative or excessive, this Court has taken the "arbitrary but essentially fair" approach of deducting a small percentage of the total hours to eliminate duplication and padding, and to compensate for the use of reconstructed time records. *See Northcross, supra,* at 636-637. A ten percent reduction here ap-

pears reasonable.[4] Thus, plaintiffs' request shall be reduced by 54.5 hours and 3.83 days for Mr. Williams and 19.81 hours and 3.6 days for Mr. Dinkins.

E. *Reasonable Rates*

Northcross makes it clear that a fee based on the hours of service provided is the preferred approach to this request. 611 F.2d at 636. The level of compensation should represent the fair market value of the services provided, and despite defendants' arguments to the contrary, current hourly rates should be applied to plaintiffs' request, even for work performed some ten years ago. This method avoids the problem of taking proof to ascertain the fair market value of the services in prior years and, more importantly, takes inflation into account.

This Court has taken extensive proof regarding the prevailing rate charged by experienced and skillful trial lawyers in this region. From this proof, it appears that the prevailing market rate in federal court litigation for an attorney of Mr. Williams' experience and skill is $100 per hour for office work and $1,000 per trial day. A resonable rate in this community for Mr. Dinkins, who began working on this case upon gaining admission to the Bar five years ago, is $60 per hour and $600 per trial day.

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[4] A slightly higher percentage would be appropriate here, but for two factors. First, plaintiffs' counsel in their affidavits claim that their documented request did not include a significant amount of time spent on phone calls, and other conversations among counsel. This statement militates against defendants' request to apply a twenty percent reduction for reconstructed time as well as defendants' objections as to padding. Second, some, but not all, of the duplication here occurred between local counsel and those attorneys hired for appellate purposes. This Court has already ruled that it cannot entertain plaintiffs' request for appellate fees and consequently, that duplication cannot be considered here. Thus, a total reduction of ten percent appears to be an appropriate response to defendants' objections as to padding, duplication, and the use of reconstructed time records.

Plaintiffs request that a contingency factor of 100 percent be applied to these rates, due in part to the difficulty of this prolonged litigation and its unpopularity in some sectors of the community. An upward adjustment of some type is appropriate here. *See Northcross, supra,* at 638-39. However, the Court concludes that a contingency factor of 25 percent will serve the purpose of the Fees Award Act, i.e., to attract competent counsel by awarding adequate compensation. With this upward adjustment of 25 percent, the effective hourly rate will be $125 for Mr. Williams and $75 for Mr. Dinkins. The daily rate for trial time will be $1,250 and $750, respectively.

The compensation for Mr. Williams is based on the following calculations:

Mr. Williams (individually):

	1,221.5 hrs.	87.3 days (amount requested)
less	550.7 hrs.	44.0 days (pre May 30, 1972 work)
=	660.8 hrs.	43.3 days
less	115.8 hrs.	5.0 days (appellate work)
=	545.0 hrs.	38.3 days
less	3.0 hrs.	2.0 days (time spent with Dr. Scott)
=	542.0 hrs.	36.3 days
less	54.2 hrs.	3.63 (10% across the board reduction)
=	487.8 hrs.	32.67 days

487.8 hrs. × $125 ($100/hr. × .25 contingency) =	$ 60,975.00
32.67 days × $1,250 ($1,000/day × .25 contingency) =	40,837.50
Total =	$101,812.50

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[3] Defendants argue that no contingency factor should be applied because the defendants stipulated at the very beginning of this litigation that Nashville schools were unconstitutionally segregated. While this is true, this lawsuit has progressed through several distinct phases, and plaintiffs have, for the most part, continued to prevail, over and above the initial inquiry as to defendants' liability.

Mr. Dinkins:

	215.6 hrs.	38.0 days (amount requested)
less	17.5 hrs.	2.0 days (appellant work)
=	198.1 hrs.	36.0 days
less	4.0 hrs.	0.0 days (time spent with Dr. Scott)
=	194.1 hrs.	36.0 days
less	19.41	3.60 (10% across the board reduction)
=	174.69 hrs.	32.4 days

174.69 hrs. × $75 ($60/hr. × .25 contingency) = $ 13,101.75
32.4 days × $750 ($600/day × .25 contingency) = 24,300.00
Total = $ 37,401.75

Mr. Williams shall be awarded $101,812.50 and Mr. Dinkins shall receive $37,401.75.

IV. *Costs*

Plaintiffs also seek to recover certain costs pursuant to Rule 54(d), Fed.R.Civ.P., and Rule 13 of the Local Rules of Court.

Included in plaintiffs' request are costs involved with plaintiffs' appeal of this Court's 1981 decision to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed this Court's opinion in part, reversed in part, and remanded for further proceedings. That order, dated July 27, 1982, also stated that each party was to bear its own costs in the appeal. Order dated July 27, 1982, No. 81-5370. Thus, plaintiffs' request for costs incurred on that appeal has already been denied, and cannot be granted by this Court. This eliminates all of the costs incurred by Mr. Lee, and those expenses incurred by Mr. Williams after April 17, 1981, the date of this Court's order.

Plaintiffs' Bill of Costs also contains items which traditionally are not taxable as costs under Rule 54(d). These include expenditures for postage, telephone calls, photocopying, and meals. See 10 Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d § 2677 at 370-373 (1983). Certain of the expenditures are taxable, however, under section 1988. The Sixth Circuit in *Northcross* held that

> [t]he authority granted in section 1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of § 1988.

611 F.2d at 639.

Thus, plaintiffs are entitled to recover costs incurred for postage, telephone calls, parking, photocopying, and air freight, as long as those costs were incurred prior to April 17, 1981, the date of this Court's order. As stated earlier, plaintiffs were ordered to bear their own costs on the appeal. The amount taxed as costs here amounts to $361.28, based on the affidavit of Mr. Williams. Meal expenses incurred by Mr. Williams are disallowed, as are the undocumented expenses of Mr. Dinkins, listed in the amount of $144.87.

Turning now to costs relating to expert witnesses, fees paid to Dr. Scott and HGH Associates to retain their consulting services are not to be taxed against defendants. Normally, Dr. Scott's expenditures for travel, subsistence, and overnight accommodations would be taxable pursuant to 28 U.S.C. § 1821. However, "the award of statutory costs is a matter for the district court, in its best judgment as to what was reasonable and necessary." *Northcross, supra,* at 640. For the reasons stated earlier regarding the recovery of attorney's fees for time spent with Dr. Scott, expenses incurred by Dr. Scott are also disallowed. The Court finds that it would be unreasonable to tax Dr. Scott's expenses against defendants. Plaintiffs will not be heard at this juncture to claim that Dr. Scott's testimony was "relevant and material" or "reasonably necessary" to support the position taken by the plaintiffs in this litigation. *See 6 Moore's Federal Practice* ¶ 54.77[5.-1] (2d ed. 1982) and cases cited therein.

In all other respects, plaintiffs' request for costs shall be denied. Costs in the amount of $361.28 shall be taxed against defendants.

V. *Contempt*

The remaining issue to be resolved at this time is plaintiffs' petition for contempt, filed December 27, 1976, and amended August 28, 1978. The gravamen of the petition is that defendants have intentionally engaged in a course of conduct which violated this Court's prior order entered in 1971. The 1971 order enjoined the use of portable classrooms for any purpose other than integration. It also enjoined the Board from renovating or enlarging by either construction or use of portables any schools that served less than fifteen percent black students after implementation of the plan.

Plaintiffs allege that the Board violated the order by using portables to implement a kindergarten program, by using the vacated Turner Elementary School as an annex for Cole Elementary, by expanding Hillsboro, Glencliff, Hillwood, Maplewood, Overton, and Stratford High Schools, and by proposing to build a Goodlettsville-Madison Comprehensive High School.

The Board contends that none of the acts alleged to be violations of the 1971 order actually constituted proscribed activity under the restrictions imposed by the Court. Moreover, the Board states that it diligently notified the Court and counsel for plaintiffs regarding any changes in the school system, even when the Board's attorney found that the changes were not of the type requiring prior judicial approval.

Regarding the use of portables at the kindergarten level, the Board argues that the 1971 order never addressed kindergarten, and that the HEW plan did not include them. The Board relies on proof presented at hearings in 1979, where a Board official testified that new portables had been placed only at schools hav-

ing fifteen percent black students under the plan as implemented, or in elementary schools to permit the opening of kindergartens. Finally, the Board points out that it petitioned this Court on May 30, 1973, for explicit approval of the plan to use portables in this manner. This petition was never acted upon.

The Board also notified the Court concerning its plans to use Turner as an annex for Cole Elementary School, although the notification did not take the form of a formal pleading. In implementing this change, the Board claims that it relied on the precedent of a 1972 ruling by this Court approving the use of an annex at Mt. View Elementary School to relieve overcrowding at Lakeview Elementary School, and on the fact that other similar changes had been adopted without any expressed dissent from the Court or counsel for plaintiffs. The Board also claims that the 1971 order was silent as to the use of closed, existing buildings to relieve over-crowding.

Turning now to the Board's decision to expand certain high schools, the Board filed its original proposal with the Court on May 30, 1973. For the next two or three years, the Board claims to have notified the court of revisions in its plan for area high schools. Eventually, the Board implemented some of the proposals under the belief that the schools affected did not come under the 1971 order because they would continue to maintain a black population of fifteen percent or more. Plaintiffs' other allegation concerning the proposed Goodlettsville-Madison Comprehensive High School is not well founded in that the school was never built. As discussed in this Court's 1980 Memorandum and Order,[6] the 1971 Court order specifically enjoined the construction of the Goodlettsville-Madison High School as proposed because it was to be located within the city limits of Goodlettsville, a location which would have promoted

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[6] *See Kelley, supra,* 492 F.Supp. at 174.

segregation. The subsequent proposal, although never implemented, called for the school to be built nearer to the imaginary line of Briley Parkway extended, thereby arguably conforming with this Court's directive. According to Board officials, the school, under this revised plan, had a projected black enrollment of greater than twenty percent.

Finally, plaintiffs contend that the Board's action in closing certain schools or changing the grade levels accommodated by particular schools somehow violate the 1971 order. Plaintiffs contend that these decisions demonstrate a discriminatory motivation on the part of the Board. The Board has responded by setting forth its objective reasons for making changes in schools located in predominantly white as well as predominantly black neighborhoods, and argues these actions in no way contravened the letter or the spirit of the 1971 order.

From the preceding recitation of the facts and positions asserted by the parties, this Court concludes that the contempt charges against the defendants should be dismissed. This Court finds that the Board, in the years following the 1971 order, acted in good faith in its efforts to comply with that order while going about the task of operating a school system. There is no proof that the Board's actions were a subterfuge to undermine the 1971 order. Furthermore, there is no evidence that the decisions of the Board were part of an effort to block the desegregation of the Metropolitan Nashville city schools. This court has consistently found that the Board has acted in good faith in implementing the 1971 order. Plaintiffs claim in this motion for contempt that his Court had previously found that the schools became resegregated due to the Board's efforts to accommodate white flight into the suburbs. This contention is totally incorrect. During the December 1982 hearings this Court explained its position on this question, stating that the resegregation resulted not from actions taken by the Board, but rather, from the 1971 plan itself which did not include the outer-reaches of Davidson County. Even after this explanation, plaintiffs con-

tinue to press forward with their inaccurate interpretation of this Court's opinion. It is time to lay that false allegation to rest once and for all.

As stated by the Supreme Court and repeated by the Sixth Circuit, "the judicial power of contempt is a potent weapon." *Reed v. Cleveland Board of Education*, 607 F.2d 749, 752 (6th Cir.1979), quoting from *ILA, Local 1291 v. Philadelphia Marine Trade Association*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967). Such a potent weapon should be used only where the evidence of contempt is clear and convincing. That is not the case here. The Board acted only where, upon the advice of counsel, it felt the 1971 order provided some latitude, and diligently notified the Court and plaintiffs about proposed changes, although little guidance from this Court was forthcoming once the 1971 order was entered. To find the Board in contempt, it would be necessary to read more into the 1971 order than was stated in its clear and express terms, and that type of approach to a contempt charge is impermissible. *Reed, supra*, at 752 ("[t]he notice of a judicial order upon violation of which a contempt finding may properly be based is such notice as would clearly tell a reasonable person what he is required to do or abstain from doing").[7]

The facts in this case, as presented to this Court, simply do not warrant a finding that the Board's actions placed it in contempt.

An appropriate order shall enter.

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[7] Additionally, *Reed* states that "defendants were required to obey the District Judge's orders, but they were not required to obey the interpretations of the District Judge's orders made by plaintiffs." 607 F.2d at 752.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

Nos. 2094, 2956

Robert W. Kelley, et al.,
Plaintiffs,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.
Defendants.

ORDER
(Filed February 23, 1983)

In accordance with the accompanying Memorandum, it is hereby ORDERED that plaintiffs are awarded attorney's fees pursuant to 42 U.S.C. § 1988 in the amount of $139,214.25; costs of $361.28 are taxed against defendants; and plaintiffs' petition for contempt is denied.

_____
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos: 83-5175, 5243

Robert W. Kelley, et al.,
Plaintiffs/Appellants/Cross-Appellees,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.
Defendants/Third Party Plaintiffs/
Appellees/Cross-Appellants.

PETITION FOR REHEARING AND FOR REHEARING EN BANC

The appellees and cross-appellants, Metropolitan County Board of Education, et al. (hereinafter Metro), hereby petition the Court for a rehearing of the case resulting in the opinion of the Court *en banc* on September 23, 1985. Further, Metro requests a rehearing *en banc.*

Metro's counsel believe, based upon their reasoned and studied professional judgment, that the Court's decision concerning the finality of the 1971 desegregation plan is contrary not only to *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), but also to the panel's decision in *this case* August 19, 1981, granting a stay of a District Court order, *Kelley v. Metropolitan County Board of Education,* No. 81-5370 (6th Cir. August 19, 1981) (attached hereto as Exhibit A). Further, consideration by the full Court, in light of the previous *en banc* determination, is necessary to maintain uniformity with the decisions of this Court in *this case.*

STATEMENT OF THE CASE

This is the attorneys' fees aspect of a desegregation case which began in 1955. In 1971, the District Court ordered the implementation of a comprehensive desegregation remedy utilizing extensive cross-town bussing wherever it was practical to use this mechanism in the 500 square mile county which constituted the school system. *Kelley v. Metropolitan County Board of Education,* Memorandum Opinion, June 28, 1971, App. 140. The District Court's order was entered pursuant to *Swann v. Charlotte-Mecklenburg,* 402 U.S. 1 (1971), and the new desegregation plan was affirmed by this Court. *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir. 1972).

In 1979, the District Court held that this 1971 plan, well intentioned though it was, and grounded in the circumstances as they then existed, had the effect of fostering resegregation over the years, despite the good faith efforts of Metro in implementing the plan.[1] Based upon this finding, consideration of a new desegregation plan was ordered, which the District Court approved and ordered implemented on April 17, 1981. *Kelley v. Metropolitan County Board of Education,* 511 F.Supp. 1363 (M.D. Tenn. 1981).

Just a few days before school was to open on August 21, 1981 for the fall semester, the plaintiffs applied to this Court for a stay of the District Court's order. A large part of the plaintiffs' rationale for the stay of the new order was that the 1971 plan was a plan approved by this Court and the District Court pur-

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[1] As the District Court said: "The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the school board in the implementation of the Court's order amounts to a *de jure* segregation." *Kelley v. Metropolitan County Board of Education,* 479 F.Supp. 120, 122-23 (M.D. Tenn. 1979). *See also Kelley v. Metropolitan County Board of Education,* 492 F.Supp. 167, 170-71, n. 10-11, 175-76 (M.D. Tenn. 1980).

suant to *Swann,* and that it was entitled to a "presumptive validity." (Plaintiffs' Application for Stay, attached hereto as Exhibit B, pp. 12-13.)

Just two days before school was to begin in Nashville, this Court, through its panel, stayed implementation of the District Court's new plan with the following language:

> In concluding...that where (as here) after many years a final school desegregation order has been entered in the District Court, appealed to this Court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought.

Kelley v. Metropolitan County Board of Education, No. 81-5370 (6th Cir. August 19, 1981) (Exhibit A) (Emphasis supplied).

ARGUMENT FOR REHEARING AND FOR REHEARING EN BANC

Metro respectfully asserts that this Court, in its stay order of August 19, 1981, addressing the substantive issues in this case, recognized the 1971 desegregation plan for what it was—*a final order* requiring implementation of a comprehensive desegregation plan in Nashville, Tennessee, pursuant to the existing case law. Accordingly, this Court declined to permit deviations from the *final* desegregation plan until the case could be heard fully on its merits. The stay opinion recognized implicitly that unless changes in the law or circumstances regarding the parties had occurred since 1972, the comprehensive plan approved by this Court in 1972 on appeal could not be modified.[2]

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[2] As this Court earlier recognized, if the plaintiffs or defendants found adverse effects from or changed circumstances after implemen-

Metro respectfully submits that the 1971 court order, affirmed by this Court in 1972, should be treated no differently during the attorneys' fees portion of this case than it was during the substantive portion. The 1971 plan, affirmed by this Court was *a final order* which a panel of this Court in 1981 viewed as a discrete step in the litigation. Indeed, deviations therefrom could not be permitted without prior appellate review, even when a failure to permit such deviations resulted in a significant delay in the opening of schools.

Thus, in addition to the District Court's factual findings concerning finality of the 1971 desegregation plan which were not held by this Court in its recent opinion to be clearly erroneous, a panel of this Court in 1981 also recognized that the 1971 plan represented a clear break in the proceedings. The inconsistency now apparent on the record should be resolved, and Metro respectfully submits that a rehearing and reconsideration *en banc* should be granted.

Respectfully submitted,

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.

By: /s/ Marian F. Harrison

215 Second Avenue North
Nashville, Tennessee 37201

Attorneys for Appellees/
Cross-Appellants

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tation of the 1971 plan, these problems could be addressed at the District Court level, under the general notion that all decrees in equity are susceptible to modification based upon changes in the law or facts. *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732, 745-46 (6th Cir. 1972).

EXHIBIT A

Office of the Clerk
United States Court of Appeals
For The Sixth Circuit
Cincinnati, Ohio 45202

August 19, 1981

Mr. Avon N. Williams, Jr.
Mr. Jack Greenberg
Mr. William R. Willis, Jr.

Re: Our Case No. 81-5370
Robert W. Kelley, et al; Henry C. Maxwell, Jr., et al, Plaintiffs-Appellants, vs. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, Defendants-Appellees.
Dist. Ct. No. 2094 & 2956

Dear Counsel:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,

John P. Hehman, Clerk

By: /s/ Suzanne W. Hogan
Deputy Clerk

Enclosure
Cert. copy: Ms. Julia B. Cross, Clerk
Hon. Thomas H. Wiseman, Jr.

No. 81-5370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert W. Kelley, et al.; Henry C. Maxwell, Jr., et al.,
Plaintiffs-Appellants,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee,
Defendants-Appellees.

ORDER

Before: EDWARDS, Chief Circuit Judge, JONES, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

On receipt and consideration of a motion for stay filed by Robert W. Kelley, et al., plaintiffs-appellants; and

On consideration of said motion under terms of Rule 8 of the Rules of Appellate Procedure and pertinent case law, *Virginia Petroleum Job. Ass'n v. Federal Power Com'n,* 259 F.2d 921, 925 (D.C. Cir. 1958); *see also North Avondale Neighborhood Ass'n v. Cincinnati Metropolitan Housing Authority,* 464 F.2d 486, 488 (6th Cir. 1972); and

Further noting that generally four factors are required for the issuance of a stay, as follows:

1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?

2. Has the petitioner shown that without such relief, it will be irreparably injured?

3. Would the issuance of a stay substantially harm other parties interested in the proceedings?

4. Where lies the public interest?

Observing from this record that affirmative answers favorable to plaintiffs' motion must be given in relation to the first two of these questions, while a negative answer appears appropriate to the third;

And concluding as to the fourth question that where (as here) after many years a final school desegregation order has been entered in the District Court, appealed to this court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought;

Now, therefore, plaintiffs' motion for stay is hereby granted, the mandate is ordered issued forthwith, and the appeal is expedited for hearing in the October term of this court.

Entered by order of the Court

/s/ John P. Hehman
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. Post Office & Courthouse Building
Cincinnati, Ohio 45202

October 15, 1985

Mr. J. Michael Cody
Mr. Charles Ralston
Mr. Avon N. Williams, Jr.
Mr. William R. Willis, Jr.

Re: Case Nos. 83-5175/5243
Robert W. Kelley, et al. vs. Metropolitan County Board of Education of Nashville, et al.

Dear Counsel:

Enclosed with this letter are the copies of the petition to rehear and for rehearing in banc which you submitted last week. These are being returned to you at the direction of the Court, inasmuch as neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circiut provide for the filing of a petition to rehear a case which has already been reheard.

Accordingly, the filing of the second petition has been withdrawn and the docket of the Court so reflects. The mandate of the Court will issue in due course.

Very truly yours,

/s/ Leonard Green
Chief Deputy Clerk

LG/jj
Enclosures

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-5175/5243

Robert W. Kelley, et al.,
Plaintiff-Appellants,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.
Defendants-Appellees/Cross-Appellants.

ORDER STAYING MANDATE
(Filed October 25, 1985)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action No. 3931

Deborah A. Northcross, et al.,
Plaintiffs,

vs.

Board of Education of the Memphis City Schools, et al.,
Defendants.

ORDER
(Filed July 29, 1966)

This cause came on to be heard on the report to the Court and motion of defendants for an order approving the modified plan of desegregation; and

It appearing to the Court from the statement of counsel that plaintiffs have not had sufficient time to study the proposed modified plan of desegregation, nor have plaintiffs had an opportunity to obtain an opinion from Jack Greenberg, Esq., one of plaintiffs' associate counsel, so that plaintiffs request an additional three (3) weeks within which to study the plan; and

It further appearing to the Court from statement of counsel that within three (3) weeks the parties will advise the Court whether or not plaintiffs agree or object to the modified plan of desegregation, and in the event that plaintiffs do not approve the plan, request will be made for a hearing on their objections.

And it further appearing to the Court that the parties agree that the defendants may put such parts of the modified plan into effect as are possible for the coming school year, except that plaintiffs expressly waive the requirement for the filing of the

report due on August 15, 1966, as provided for in sub-paragraph 2 of paragraph IX of the modified plan.

IT IS THERFFORE, ORDERED, ADJUDGED AND DECREED, that on or before August 19, 1966, the parties report to the Court as to whether the plaintiffs approve the modified plan of desegregation heretofore filed in the cause by defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendants may put such parts of the modified plan of desegregation into effect as are possible for the school year commencing July 1, 1966.

/s/ Marion D. Bond
Judge

Approved:

/s/ A. W. Willis, Esq.
For Plaintiffs

Evans, Petree, Cobb & Edwards
By _____
For Defendants

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C.A. No. 3931

Deborah A. Northcross, et al.,
Plaintiffs,

vs.

Board of Education of the
Memphis City Schools, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO FEES AND COSTS

This school desegregation case is before the Court on remand from the United States Court of Appeals for the Sixth Circuit for "a complete recalculation" of certain attorneys fees and litigation expenses due under 42 U.S.C. §1988. *Northcross v. Board of Educ. of the Memphis City Schools*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

The opinion of the Court of Appeals dealt with consolidated appeals from two judgments entered by this Court on two separate applications of the plaintiffs for awards of costs, expenses, and attorneys fees. The first judgment dealt with plaintiffs' application for compensation for services and expenditures from the commencement of this suit in 1960 through 1976. With respect to this judgment, the Court of Appeals remanded the case to this Court "for any necessary evidentiary proceedings, a resolution of the legal issue concerning the finality of the 1966 ruling, and a recalculation of attorneys fees due to the plaintiffs for services rendered to them until the final desegregation order was entered in 1974." *Id.* at 643.

The second judgment before the Court of Appeals disposed of plaintiffs' application with respect to services and expenditures in connection with a hearing in this Court in May 1977 necessitated by a Board of Education request to modify the final plan of desegregation (Plan Z) in various ways. As to this judgment, the Court of Appeals reviewed the record and made its own determination of reasonable fees and costs to be awarded. Thus, with respect to that judgment, the Court of Appeals "remanded with instructions to the district court to enter judgment for plaintiffs in the amount of $22,604.02 to compensate them for services rendered by their attorneys and expenses incurred in 1977." *Id.* at 643. On 3 October 1980 this Court entered an order directing the Board to pay the amount set by the Court of Appeals, plus interest, for a total award on this part of the case of $25,605.51. This order also directed the Board to pay plaintiffs $4,020.55 in appellate costs as per the mandates issued by the Court of Appeals.

Following the Supreme Court's denial of certiorari, this Court held several conferences with counsel for the parties, the parties have submitted supplemental affidavits, stipulations and documentation, proposed findings and conclusions, and the Court has conducted a hearing. While these proceedings were going on, plaintiffs and the City of Memphis settled their dispute for $20,000, as reflected by the consent order approved and entered by the Court on 1 December 1980.

This opinion incorporates findings of fact and conclusions of law with respect to all services rendered by plaintiffs' counsel and expenditures incurred from the commencement of this litigation in 1960 until the date of this opinion, exclusive of those aspects of the fee/cost dispute described above, which have been resolved.

In the remand opinion the Court of Appeals explained that fee awards in civil rights cases may no longer be determined on the basis of the appropriate statute in this case, the Civil Rights

Attorneys Fees Awards Act of 1976 (42 U.S.C. §1988). Now "the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees." *Id.* at 632. The Court of Appeals indicated that it found from the legislative history of the statute that Congress expressly commands the courts to use the broadest and most effective remedies available to them to achieve the goals of the civil rights laws. *Id.* at 633. The examples which the Court of Appeals gave to explain the "broadest and most effective remedies which Congress intended" and the many holdings which sometimes sternly and critically found that this Court had abused the "discretion" referred to in the statute wherein it provides: "the court, in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs," indicate that this Court far too narrowly interpreted the law. In these findings and conclusions this Court will undertake to award fees commensurate with the command of the Court of Appeals as set forth in the remand opinion.[1]

Since 1968 the plaintiffs have been represented by the Memphis law firm of Ratner & Sugarmon and its predecessor partnerships. Four of the firm's lawyers at various times have provided representation to plaintiffs: Louis R. Lucas, an initial partner in the firm; William E. Caldwell, a partner in the firm since spring 1974 and an associate prior to that time; Elijah Noel, Jr., a former associate in the firm; and Richard B. Fields, an associate in the firm. Prior to 1968 the plaintiffs were represented primarily by A. W. Willis and R. B. Sugarmon, Jr., who became initial partners in the firm when it was formed in 1967.

From the commencement of the litigation in 1960 until the present time, the representation of plaintiffs has been assisted,

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[1] It is here noted that the relative positions of the parties are typical of their positions on all of the major issues in this much litigated case — opposite extremes.

both with financial support and professional services, by the NAACP Legal Defense and Educational Fund, Inc. (Legal Defense Fund). The Legal Defense Fund is a non-profit corporation chartered by the New York Court of Appeals and authorized to serve as a legal aid society, one of its purposes being to render legal assistance gratuitously to "colored persons" suffering injustice by reason of race or color who are unable on account of poverty to employ and engage legal aid in their own behalf. The Legal Defense Fund does not charge individuals whom it represents for its services. Affidavit of Norman J. Chachkin ¶6 (filed 21 September 1976). The Legal Defense Fund has paid most of the litigation expenses incurred by plaintiffs in this litigation. In addition, the Legal Defense Fund has periodically paid to the firm a relatively small per diem allowance for professional services for the purpose of helping defray the overhead expenses as a result of its participation in the case. Throughout the 20-year history of the litigation the firm has received about $27,000 in such per diem allowances. Second Supplemental Affidavit of Norman J. Chachkin, ¶4 (filed 8 November 1976); Supplemental Affidavit of William E. Caldwell, ¶3 (filed 4 October 1976). Fees recovered by the Legal Defense Fund for the services of its staff attorneys in litigation are utilized in furtherance of the organization's civil rights litigation and its other purposes. Supplemental Affidavit of Norman J. Chachkin, ¶6 (filed 4 October 1976).

The bulk of the services rendered by the Legal Defense Fund since 1968 were provided by Norman J. Chachkin and, more recently, by Bill Lann Lee. Prior to 1968 most of the Legal Defense Fund services were provided, first, by Constance Baker Motley, now a United States District Judge for the Southern District of New York, under the supervision of Legal Defense Fund director-counsel Thurgood Marshall, now an Associate Justice of the Supreme Court; and later by Derrick A. Bell, now a professor of law at Harvard Law School. In their initial submission on fee amounts of 4 October 1976 the plaintiffs requested an award for services rendered by the Legal Defense

Fund while Judge Motley and Justice Marshall were associated with the organization. On 5 October 1976, however, plaintiffs withdrew their request with respect to these services — estimated at 210.8 hours — "[i]n order to avoid any possibility of the appearance of impropriety or public misunderstanding" even though any fees recovered for these services would have gone to the Legal Defense Fund, not to the individuals.

Entitlement to Fees for Pre-1968 Services

The first issue this Court will address under the Court of Appeals' mandate is whether or not plaintiffs are entitled to recover attorneys fees for services rendered prior to 1968. With respect to the post-1968 period, the Court of Appeals directed: "The fee awarded should cover at least the period back to 1968 when the suit became active again following the Supreme Court's *Green* decision." 611 F.2d at 635. The Court then described the issue which this Court is now required to resolve (*id.*):

> There is an unresolved dispute concerning the pre-1968 period which we leave to the district court to resolve. The School Board contended below that the district court action of July 29, 1966, the last action before the Supreme Court's *Green* decision, was a "consent order" which undertook to dispose of all outstanding phases of the case, including fees and costs. It is true that a long, complicated case of this sort can result in several "final" orders, which in the interest of finality are deemed to dispose of all foregoing issues. Absent a timely appeal, a party is bound by the order and any later challenge is deemed to be a collateral attack judged by different, and more stringent standards than on direct review. *Bradley, supra,* 416 U.S. at 710-11, 95 S.Ct. 2006. If the defendants are correct in their characterization of the 1966 action in the interest of finality, plaintiffs should not be permitted to reopen that judgment in order to obtain attorneys' fees. We leave this matter to the district court.

The Court finds that the services expended on the portion of the case occurring prior to the filing on 26 July 1968 of plaintiff's motion for further relief should be denied. A plan of desegregation in this cause conforming to what was thought to be the then existing legal standards, was developed and filed jointly by the parties on 22 July 1966. That plan was intended and treated by the parties as a final plan of desegregation, and a distinct break in the proceedings in this case occured at that time. Previous to that time there had been two appeals taken successfully by the plaintiffs. The 1968 motion for further relief did not grow out of any evident intention of these parties to litigate that plan further, but was the direct result of subsequent Supreme Court decisions in the case of *Green v. County School Board of New Kenty County, Virginia,* 391 U.S. 430 (1968), and its companion cases which represented very significant new development in the law pertaining to school desegregation. The case at bar is similar to the case of *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir. 1978), wherein the Court held that plaintiffs might timely file for a fee resulting from the continuous hearings and appeals on their motion for further relief, but denied a fee for earlier "discrete steps" in the litigation.

Calculation of a Reasonable Fee

The Court of Appeals summarized the approach required to arrive at a reasonable attorneys fee as follows: (*id.* at 642):

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service

> properly," "the customary fee," and the "experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case.

The Court of Appeals has thus required a three-pronged approach which requires this Court to determine (1) the number of hours of services performed by plaintiffs' attorneys, (2) the "normal hourly billing rate" applicable for each attorney, and (3) whether upward adjustments should be made and the amount thereof.

Hours of Service Provided

The Court of Appeals made it clear that plaintiffs' attorneys are entitled to compensation for all the time reasonably expended on this case because the plaintiffs prevailed in the case as a whole. The Court said (*id.* at 636):

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith . . . . The fact that these lawyers advocated a desegregation remedy of broader scope and faster pace than was ultimately adopted cannot be considered to be unreasonable. Their clients have prevailed; the Memphis school system is desegregated.

The Court further stated on page 636:

> We conclude that a fee calculated in terms of hours of service provided is the fairest and most manageable approach. The district court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. This finding must first take into account the affidavits of counsel. The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action, so that we may determine whether the court properly exercised its discretion or made an error of law in its conclusion. Hours may be cut for duplication, padding or frivolous claims. In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services.

This Court has never found, and does not find, that any of the positions asserted by plaintiffs were made in bad faith or were frivolous. Accordingly, plaintiffs are entitled to compensation for all claimed hours which were actually spent on the case except an "arbitrary" adjustment for duplication and other reasons set forth below. The various affidavits of plaintiffs' counsel claim a total of 5,213.5 hours of services. The services of plaintiffs' counsel, as well as litigation expenses and counsels' backgrounds and experiences, are set forth in 18 affidavits of counsel. The Court will analyze these services with respect to each phase of this case in greater detail below. Plaintiffs' attorneys did not maintain detailed contemporaneous time records prior to 1974 (Stipulation of Counsel, ¶3, filed 18 Nov. 1980).

They have reconstructed the services rendered for that period from billings submitted to the Legal Defense Fund for per diem allowances, from partial calendar records, and from the file in

the case. The reconstruction process is described in Caldwell Aff. ¶6, Supp. Caldwell Aff. ¶3, 2d Supp. Caldwell Aff. ¶2, Lucas Aff. ¶5, Chachkin Aff. ¶3, and Stipulation of Counsel ¶2 (filed 18 Nov. 1980).

It is the opinion of this Court that the directions of the Court of Appeals intended for this Court to accept these calculations in spite of their faults. Therefore, the Court finds that the hours claimed on the affidavits are allowed as a basis for the fees except to the extent that they are expressly disallowed in these findings.[2]

The Court disallows 12.55 hours from the total shown on the affidavit of Elijah Noel dated September 20, 1976, on the basis that there is an error in addition.

Since the remand of this case, further affidavits have been submitted including the affidavit of Richard B. Fields dated August 5, 1980, seeking an award for services in monitoring the Court Order and in negotiating modifications to Plan Z since June 1977. The Court of Appeals has held that monitoring services are allowable, and Mr. Fields is seeking an award based on a total of 127.6 hours. The bulk of these hours is allowable with the exception of some items which fall outside the scope of this lawsuit. Those items include such matters as attendance at an Urban League Symposium and lunch with representatives of such community organizations as MIFA and the news media are not sufficiently connected to the litigation of this case to warrant compensation. Those items are numbers 61, 65, 66, and 76 on the attachment to the affidavit and they total 12 hours, leaving a total of 115.6 allowable hours.

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[2] While plaintiffs' lawyers have utilized considerable law-student and paralegal assistance during various phases of the litigation, they make no request that those services be compensated (because of the inadequacy of records reflecting those services). Caldwell Aff. ¶9.

In determining the net allowable hours, the Court is also called on to determine whether reductions should be made based upon duplication of hours and/or over-estimates as to the number of hours spent. It has been fairly settled in this Circuit that, where duplication appears, the Court is entitled to make an across-the-board "arbitrary" adjustment based on an estimated percentage of duplication, rather than attempting to eliminate specific hours on an itemized basis. This approach was approved in *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978), and used by the Court of Appeals in reaching a final award of attorneys fees for the 1977 hearing in the appeal of this case. Similarly, a 10% reduction in total hours based on duplication alone was used by the Court of Appeals in *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979). In the present case substantial duplication of effort appears not only from the number of counsel appearing on briefs and appearing at particular trials of this cause, but from the fee affidavits themselves, which reflect extensive consultation and conferences among co-counsel and which show that the receipt of documents, pleadings, and orders usually occasioned the expenditure of a good deal more time than was necessary to review the documents. This time was obviously occasioned by the multiplicity of counsel in the case and by the fact that the case was handled throughout on the basis of continuing communications between trial counsel and Legal Defense Fund counsel in New York. Even at appellate arguments in the case, co-counsel would frequently appear, as exemplified by the ninth item on Mr. Caldwell's original affidavit of September 20, 1976. This item claims 16 hours for Caldwell based upon the argument of Louis Lucas in the 6th Circuit Court of Appeals. Based on the record and on this Judge's familiarity with the proceedings in this case, the Court finds that a Court of Appeals maximum of 10% reduction in otherwise allowable hours should be granted as the means of accounting for these duplicative services, except for the portion of the case pertaining to fee litigation.

Reasonable Hourly Rates

The guiding standard laid down by the Court of Appeals for determining the reasonable hourly rates of compensation for each of the Attorneys for the plaintiffs in this cause — the second part of the mandated "analytical approach" — is the "fair market value of the services provided." The Court elaborated as follows (*id.* at 638):

> We have indicated in several opinions that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service being provided. Again turning to our mandate to award fees "as is traditional with attorneys compensated by a fee-paying client," a scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to §1988. The use of broad categories, differentiating between paralegal services, in-office services by experienced attorneys and trial service, would result in a fair and equitable fee.
>
> In determining what the level of compensation for each category of service should be, the court should look to the fair market value of the services provided. In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney. For those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance.

The Court of Appeals illustrated this method of arriving at normal hourly rates in its disposition with respect to the 1978 fee award. There the Court applied a "bifurcated scale" in determining the normal hourly rate for plaintiffs' counsel Lucas. In calculating the fee for Lucas the Court used "as base figures $125 per hour for trial work and the $75 per hour which the district court found to be reasonable for office services." *Id.* at

641. With respect to the services of plaintiffs' counsel Noel and Fields, the Court of Appeals accepted this Court's across-the-board base fee of $60 per hour for Noel and $40 per hour for Fields. *Id.*

In its previous decision of November 4, 1977, this Court set the base fee rate for services rendered between mid-1971 and 1974 at $60 per hour for Lucas and $40 per hour for Caldwell during the earlier parts of that time frame, and $60 per hour for Caldwell during the later proceedings. Neither the plaintiffs in their appeal nor the Board in its cross-appeal challenged these rates, and the Court of Appeals "express[ed] opinion as to the accuracy of the fee per hour awarded in the 1977 award . . . " *Id.* at 641. The record herein persuasively demonstrates that the rates previously established by this Court for the 1971-74 period are reasonable reflections of the fair market value at the time of the services provided by Caldwell and Lucas.

Inflation Factor

The question remains whether the base fee rates applicable for earlier time periods should be adjusted to account for the greatly diminished purchasing power of such early-year dollars in light of the intervening years of inflation. This Court is required to resolve this issue by the following directive of the Court of Appeals: "Among other factors, the district court will be required to consider whether the inflation of the intervening years must be taken into account, or whether the lower rate which prevailed for services at the time they were rendered has been balanced by the long delay which will reduce the purchasing power of the award's dollars in the present marketplace." *Id.* at 640. The inflation problem can be resolved either by applying an inflation factor to the normal hourly rates into line with 1980 dollars, or, alternatively, by applying recent hourly rates to the services rendered in the earlier years.

The attorneys for the plaintiffs advocate and claim that inflation should be compensated for by paying 1981 hourly rates for

all hours devoted to the case. This means that Louis Lucas would be paid $125 per hour for services rendered in 1971, a period in which this Court found and plaintiffs concede an hourly rate for his services to be $60. As experience and the record reflect, the value of the hourly rate has increased for attorneys based upon the inflationary trend and the increased value of the services of the attorney due to experience. Therefore, the use of current or recent rates appears to be a plausible method of adjusting for inflation even though it is arbitrary for some times.

This Court is of the opinion that hourly rates used by the Court of Appeals in its November 1979 remand opinion should be used as a basic starting point. It awarded Louis Lucas $125 per hour as a base fee for court work, and found that rate to be high for office services. Those services were established at $75 per hour. The only other attorneys who were awarded fees by the Court of Appeals were Mr. Noel, at $60 per hour, and Mr. Fields, at $40, with no differentiation for court and office work.

The other lawyers who are entitled to compensation are William E. Caldwell, Norman J. Chachkin and Bill Lann Lee.

Caldwell became involved in this case as an attorney from the commencement of his practice in 1970. He took a leave of absence from the firm of Ratner & Sugarmon to work with the Lawyers Committee for Civil Rights Under Law in Washington, D.C. He returned in October 1978 and assumed the role of lead counsel in these attorneys fee proceedings. As of the time of his Third Supplemental Affidavit filed August 5, 1980, he stated his "professional rate for federal litigation on behalf of the few fee-paying clients" of his was $90 per hour. This Court finds that the rates per hour to be paid him to compensate for inflation should be $90 per hour for in-court services and $60 per hour for office services.

Norman J. Chachkin was a staff attorney for the Legal Defense Fund from April 1969 until June 1975. He did much of the appellate work on the case and reviewed or duplicated the

work of local counsel in this Memphis school case. Bill Lann Lee was the staff Legal Defense Fund attorney who replaced Chachkin as overseer of the local attorneys. They are attorneys whom the Court of Appeals have ordered to be compensated. They are attorneys who had no private practice. Therefore, we look to the rates customarily charged in the community for similar services for guidance. *Id.* at 638. Their community is New York, and they say that the rates for their comparable services are $125 for Chachkin and $90 for Lee. Based upon the mandate of the Court of Appeals and the only evidence in the record, this Court establishes the rate for Chachkin to be $125 for in-court services and $75 for out-of-court services, and the rate for Lee to be $90 for in-court and $60 for out-of-court services.

The "Appellate" category includes briefing and argument — which the Court deems to be the equivalent of being "in court" on appeal — but such appeal-related services as record designation, appendix preparation, and procedural motions are categorized as "in-office" services. The Court further finds that "Appellate" services should be compensated at the same rate as "In-court" services.

Upward Adjustments

The Court of Appeals noted on page 638 of the remand opinion that the routine hourly rate of an attorney may not be the maximum which can and should be awarded because it might not take into account the special circumstances which authorize a higher fee. The Court noted that perhaps the most significant factor which renders an hourly rate unreasonably low is the fact that the award is contingent upon success.

The attorneys for the plaintiffs in their proposed findings have divided the sevices rendered into categories which are based upon the time and nature of the services rendered. There are seven such categories for services rendered after 1968. These categories and the proposed upward adjustment for the contingency factor are as follows:

	Upward Adjustment
Services Rendered Between 1968 and This Court's Liability Decision in December 1971	150%
Services Rendered Between December 1971 and June 1972	50%
Appellate Services Between June 1972 and August 1972	100%
Services Rendered During Final Plan Proceedings August 1972 — July 1973	10%
Monitoring Services 1973-80	0%
Fees Litigation 1974-79	100%
Fees Litigation November 1979 to date	0%

This method embraces in some categories the very thing that the Court of Appeals rejected as not authorized, namely the "bonus" multiplier or "windfall," 611 F.2d page 638.

For the period between 1968 and 1971, Louis Lucas and Norman Chachkin seek compensation for courtroom work at the rate of $312.50 per hour. In the opinion of this Court *this is not what the Court of Appeals mandated.*

Although the Court of Appeals allowed a 10% contingency adjustment for the 1978 fee award, which they summarily ruled upon, this Court is not adjusting the hourly rates on the basis of the contingency element. On page 641 of the remand opinion the Court of Appeals distinguished the 1978 fee award fact situation from the earlier phase of the case in the following manner:

> The hearings here involved were collateral to and distinct from the desegregation suit itself, which had been finally terminated in 1974, so had the plaintiffs failed to prevail on the merits the district court would have been justified in denying fees altogether. Therefore, there was a real element of contingency as to whether the attorneys would be compensated for their services at all.

In the post 1968 phase of this desegregation suit, the plaintiffs were seeking appropriate student and faculty desegregation against a defendant Board of Education that had openly and defiantly violated the constitution and was reluctant to come into compliance with the constitution. It was actually a matter of perseverence and allowing the trial and appellate courts to establish the ultimate standards in a rather slow trial and error method.

Plaintiffs and their attorneys were the vicarious beneficiaries of the landmark trilogy of *Green, Raney* and *Monroe*, 391 U.S. 430 *et seq.* (1968) (elimination of ineffective freedom of choice and freedom of transfer, desegregation plans); *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969); and *Carter v. West Felincia Parish School Board*, 396 U.S. 226 (1969) (do it now); *United States v. Montgomery County Bd. of Ed.*, 395 U.S. 225 (1969) (a faculty desegregation case); *Swan v. Charlotte-Mecklenburg Bd. of Ed.* and *Davis v. Bd. of School Comm'rs*, 402 U.S. 1 and 33 (1971) (the busing cases); and *Northcross v. Bd. of Ed. Memphis City Schools*, 412 U.S. 427 (1973)[3] or *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), (attorneys fee cases).

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[3] The Supreme Court opinion in this *Northcross* case was one which indicated fees were allowable on the application of the plaintiffs based upon the first application for fees in this case, which application was made in the Court of Appeals, not this Court. In spite of the Supreme Court opinion, which was favorable for fees to be awarded, on remand the Court of Appeals for the Sixth Circuit refused to award fees because the application was untimely filed.

It must be remembered that in many instances the plaintiff took implausible, extreme positions that were not adopted. While the Court of Appeals has ruled that this does not prevent awarding fees for those unsuccessful services, those services should certainly not be a factor in a contingency additur.

Based upon the above reasons the Court hereby makes the following findings for the hours worked by the respective attorneys for the various allowable periods covered by this ruling.

Services Rendered between Plaintiffs' 1968 *Green* Motion for Further Relief and this Court's Decision of December 10, 1971:

The Court finds that the following hours of services were rendered by plaintiffs' attorneys during the period between plaintiffs' 1968 *Green* motion for further relief and this Court's opinion of December 10, 1971, holding the Board constitutionally liable for the school segregation then existing. Ten percent has been deducted for duplication.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	361 − 36.1 = 324.9	391 − 39.1 = 351.9	352.1 − 35.21 = 316.89
Caldwell	126 − 12.6 = 93.4	22 − 2.2 = 19.8	275.6 − 27.56 = 248.04
Chachkin	— — —	125 − 12.5 = 112.5	115.6 − 11.56 = 104.04

Services Rendered between December 10, 1971, and June 1972 (Plan A proceedings):

The Court finds that the following hours of services were provided by plaintiffs' lawyers during the remedial proceedings from December 1971 to June 1972.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	14 − 1.4 = 12.6	— —	70 − 7 = 63
Caldwell	96 − 9.6 = 86.4	20 − 2 = 18	243 − 24.3 = 218.7
Chachkin	— — —	— —	33 − 3.3 = 29.7

Appellate Services Rendered between June 1, 1972 and August 29, 1972:

The Court finds that the following appellate services were rendered between June 1 and August 29, 1972.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	—	24 − 2.4 = 21.6	4 − .4 = 3.6
Caldwell	—	186 − 18.6 = 167.4	35 − 3.5 = 31.5
Chachkin	—	237 − 23.7 = 213.3	27.5 − 2.75 = 24.75

Services Rendered during Plan Z Proceedings August 29, 1972 to July 1973:

The Court finds that the following hours of services were rendered by plaintiffs' counsel during the remand proceedings leading up to this Court's Plan Z orders.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	18 − 1.8 = 16.2	—	10 − 1 = 9
Caldwell	90 − 9 = 81	—	306.6 − 30.6 = 275.4
Chachkin	75(Ap) − 7.5 = 67.5	—	67.3 − 6.73 = 60.57

Monitoring Services — 1973-1980

The Court finds that the following hours of monitoring services have been provided by plaintiffs' counsel since 1973.

Lawyer:	In-Office Hours:
Caldwell	104.4 − 10.44 = 93.96
Chachkin	11 − 1.1 = 9.9
Noel	28.9 − 2.89 = 26.01
Fields	115.6 − 11.56 = 104.04

Fees Litigation —— 1974-1979

The Court finds that plaintiffs' counsel expended the following hours litigating their entitlement to attorneys fees between 1974 and the November 1979 decision of the Court of Appeals.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	8		18
Caldwell	18	202.99	278.45
Chachkin	76*	——	60.5
Noel	——	——	5

No duplication adjustment is applied to this category of service.

* Includes 70 hours from 1972-73 re: 20 U.S.C. §1617 (items 143 and 162, Ex. 1 to Chachkin Aff.).

Fees Litigation — November 1979 to Date

The Court finds that the following hours of service have been expended on the fees issue since the decision of the Court of Appeals.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Caldwell	——	17.65	38.5
Chachkin	——	3.0	——
Lee	——	7.9	——

TOTAL FEE AWARD

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:	Total:
Lucas	(735.2 @ $125.) $91,900.00		(410.49 @ $75.) $30,786.75	$122,686.75
Caldwell	(704.64 @ $90.) $63,417.60		(1184.1 @ $60.) $71,046.00	$134,463.60
Chachkin	(472.30 @ $125.) $29,037.50		(289.46 @ $75.) $21,709.95	$80,747.45
Fields		(104.04 @ $40.) $4,161.60		$4,161.60
Noel		(31.01 @ $60.) $1,860.60		$1,860.60
Lee	(7.9 @ $90.) $711.00			$711.00
			TOTAL:	$344,631.00

In summary the Court notes that it has accepted the hours claimed by the plaintiffs' attorneys even though in some respects they were based upon estimates due to a lack of accurate records. These hours were subject only to an "arbitrary" duplication adjustment applied to certain types of services. The Court has also increased the rate for earlier services by an inflation factor by applying a recent rate retroactively. It has also refused to award a "bonus" or "windfall," it has refused to award an "arbitrary" upward adjustment for a contingency for the period 1968 to date, and it has denied the pre-1968 claim. This represents this Court's attempt to comply with the command of the Court of Appeals as set forth in the remand opinion and in the light of the "discretion" given to district courts by the congress in the applicable statutes.

While this award appears to be a large amount of money, it must be remembered that the services extended over a long period of time and were required in a large measure because the defendant school board took a determined position not to comply with the constitution as interpreted by the rulings of the Supreme Court.

Litigation Costs and Expenses

The plaintiffs have itemized litigation expenses and costs in the amount of $35,128.22 (3d Supp. Caldwell Aff., ¶3) (Supp. Chachkin Aff. ¶¶3, 4 and Exhibit 1) (Joint Caldwell/Chachkin Aff., ¶7 and Exhibit 2). There is no dispute that the plaintiffs actually expended this amount of money in connection with this litigation, and the Court so finds.

The Court of Appeals held as follows with respect to plaintiffs' entitlement to recovery of out-of-pocket expenses (611 F.2d at 639):

> There are two separate sources of authority to award out-of-pocket expenses. Some expenses are included in the concept of attorneys' fees, as "incidental and necessary ex-

> penses incurred in furnishing effective and competent representation," and are thus authorized by §1988. . . . The authority granted in §1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of §1988.
>
> Other costs are on a different footing. These include those costs incurred by a party to be paid to a third party, not the attorney for the case, which cannot reasonably be considered to be attorneys' fees. . . . These include, among others, docket fees, investigation expenses, deposition expenses, witness expenses, and the cost of charts and maps. Most of these expenses have long been recoverable, in the Court's discretion as costs, pursuant to 28 U.S.C. §1920 . . . .

With respect to statutory costs, the Court of Appeals further stated as follows (*id.* at 640):

> The award of statutory costs is a matter for the district court, in its best judgment as to what was reasonable and necessary, and the appellate courts will not normally interfere with the exercise of that discretion. . . . It would be advisable for litigants to obtain authorization from the district court before incurring large items of expense, though of course, failure to do so does not bar reimbursement if the trial court should decide that the expenditures were nevertheless reasonable and necessary.

This Court disallows the following items in that they do not fit into the reasonable and necessary category:

3/31/60	Cost bond	$250.00
2/23/63	Dr. Floyd Bass, Expert	$492.58
6/4/63	Dr. Floyd Bass, Expert	$ 54.13
3/14/69	Dr. Gordon Foster, Expert	$1246.75
10/19/71	Lunch for Experts	$ 16.35
12/5/71	Dr. Gordon Foster, Expert	$218.95
1/24-26/72	Dr. Gordon Foster and Dr. Marzell, Experts	$1569.19
3/5/72	Dinner for experts	$ 39.22
2/1/72 - 3/20/72	Dr. Gordon Foster, Expert	$793.59
3/20/72	Dr. Gordon Foster, Expert	$205.78
3/28/72 - 4/5/72	Dinner Expenses for Experts	$ 44.57
12/7/73	Barry Wiener, Investigator	$ 50.00
6/12/79	Lunch	$ 3.50
6/13/79	Lunch	$ 5.00
		$7002.61

Dr. Foster was a way-out expert that recommended some extreme plans for allegedly desegregating the schools.

Therefore, the Court deducts from the expenses claimed the sum of $7002.61 and awards as reasonable and necessary expenses $28,125.61.

All amounts previously paid on the fees award herein shall be credited in the judgment, and no interest is allowed in view of the inflation factor phase of the award.

IT IS SO ORDERED.

ENTER: This 4th day of January 1982.

/s/ Robert M. McRae, Jr., Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action Nos. 2094 & 2956

Robert W. Kelley, et al,
Henry C. Maxwell, et al,
Plaintiffs,

vs.

Metropolitan County Board
of Education of Nashville
and Davidson County,
Tennessee, et al,
Defendants and
Third-Party Plaintiffs,

Mansfield Douglas, et al and
Metropolitan County Board of
Education of Nashville and
Davidson County, Tennessee,
et al,

v.

Elliott L. Richardson, et al,
Third-Party Defendants.

PETITION FOR ATTORNEYS FEES

(Filed Feb. 8, 1974)

The petitioners, Third-Party Plaintiffs in the above action, move the Court to allow them an attorneys fee in the amount of thirty-five thousand ($35,000) dollars, or in such other lessor

amount as the Court deems reasonable, and reimbursement of the costs they have incurred in the course of this litiation. This petition is filed pursuant to the authority of Title 7, Section 718 of the Emergency School Aid Act (20 USC §1617), and is based upon the following grounds:

1. The above statute provides that, upon the entry of a final order by a court of the United States against the United States or any agency thereof, for failure to comply with the Emergency School Aid Act or for discrimination on the basis of race, color or nationality in violation of the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the Court may allow the prevailing party a reasonable attorneys fee, in addition to other costs of litigation.[1] This provision became effective on July 1, 1972, and has been in effect throughout the pendency of this Third-Party action.

2. The United States Supreme Court has construed this provision to mean that a plaintiff who obtains affirmative relief in a civil rights case involving elementary and secondary education "should ordinarily recover an attorneys fee unless special circumstances would render such an award unjust", *Northcross v. Board of Education of the Memphis City Schools,* 93 Sup. Ct. 2201 (1973). No such circumstances exist in the present case. The Third-Party plaintiffs have derived no personal benefit

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[1] "Upon the entry of a final order by a Court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin, in violation of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the Court, in its discretion, upon finding that the proceedings were necessary to bring about compliance may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the cost." 20 USC

from the assertion of their claim, the judicial assertion of the claim was clearly necessary in order to obtain the relief sought, and the judgment obtained may assist the Metropolitan School System very significantly in its efforts to achieve desegregation in accordance with the Court's previous orders. Under these circumstances an award of attorneys fees would be appropriate even in the absence of statutory authorization. *Bell v. School Board of Powhatan County, Virginia,* 321 F.2d 494, 500 (Fourth Cir. 1963) ("Attorneys fees justified when the bringing of action "should have been unnecessary and was compelled by unreasonable, obduite obstinacy") and *Brewer v. School Board of City of Norfolk, Virginia,* 456 F.2d 943, 951 (Fourth Cir. 1972) (Award of attorneys fees justified when plaintiff obtained monetary benefit for a class of persons, equivalent to a 'common fund').

3. It has been held that, in determining the appropriate of attorneys fees to be awarded in cases of this nature, the following factors may be considered: The nature of the litigation, the amount involved in the controversy, the result of the suit, the length of time spent on the case, the care and diligence exercised, and the character and standing of the attorney. *Berkshire Mutual Insurance Company v. Moffett,* 378 F.2d 1007 (Fifth Cir. 1967). The petitioners respectfully submit that the fee requested is justified on the above grounds, and that it is consistent with fees customarily paid for the performance of similar legal services in the Federal Courts for the Middle District of Tennessee.[2] The petitioners submit herewith a summary of the hours spent and expenses incurred in the preparation and presentation of the Third-Party claim in this case.

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[2] Note for example that the private attorneys representing Metropolitan Government on appeal from the Court's latest desegregation order in the captioned case, were paid a fee of fifty thousand ($50,000) dollars.

Respectfully submitted,

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT

BY: /s/ Gilbert S. Merritt

WILLIS, KNIGHT & BARR

BY: /s/ Alfred H. Knight, III

APPENDIX K

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action Nos. 2094 & 2956

Robert W. Kelley, et al

vs.

The Metropolitan County
Board of Education, et al

MOTION OF PLAINTIFFS FOR GRANTING OF THEIR REQUESTS FOR COUNSEL FEES

Plaintiffs, by their undersigned counsel, respectfully renew their repeated requests, during the course of this litigation, for an award of costs and reasonable counsel fees; specifically, plaintiffs would show this Court that Sec. 718 of the Education Amendments of 1972, 20 U.S.C. Sec. 1617, requires such an award in their favor since they are the prevailing parties in this school desegregation case, prosecution of which was made necessary by the defendants' continuous failure and refusal to carry out their constitutional obligations, and further, that Sec. 718 requires that this Court make such an award for the entire course of this litigation, see *Bradley v. School Bd. of Richmond,* 416 U.S. 696 (1974). Plaintiffs submit herewith a legal memorandum which outlines their right to such an award.

Plaintiffs respectfully suggest that it would be appropriate for this Court to decide the issue of defendants' liability for an award of fees in favor of plaintiffs before issues concerning the amount of a reasonable award are litigated. Such a procedure would also permit the parties to attempt to settle those issues through settlement negotiations which are, however, unlikely to be fruitful in the absence of a ruling on plaintiffs' entitlement to an award. *See Bradley, supra,* 416 U.S. at 705. Accordingly,

plaintiffs do not submit herewith documentation of the thousands of hours' work performed by their counsel over the years in this matter, nor of the thousands of dollars of expenses incurred in the successful prosecution of this action. That material is being prepared, however, for submission to the Court at the appropriate time.

WHEREFORE, plaintiffs respectfully pray that upon consideration of this Motion, the Memorandum filed herewith, and after such further proceedings as are appropriate, this Court issue its Order awarding plaintiffs costs and reasonable counsel fees from the commencement of this litigation — and its predecessor *Kelley* and *Maxwell* actions— to date, and directing the parties to attempt to agree upon the amount of such a reasonable fee, reserving power unto the Court to set such amount in the absence of agreement.

Respectfully submitted,

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